Supreme Court, U.S.
FILED
99 112 JUL 14 1999
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No.

IN THE
Supreme Court of the United States

JOHN WILBUR McFADDEN, JR., M.D.,

Petitioner,

v.

MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a violation of the right to due process of law occurs when a physician's right to practice is restricted as a result of a proceeding before a board in which investigative, prosecutorial and adjudicative functions were combined and where the actions and statements of the board members cast substantial doubt on their impartiality.

2. Whether, in the course of a medical board disciplinary hearing, the presentation of testimony, including opinion testimony, by hearing officers who are not subject to cross-examination, violates the right to due process of law.

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Petitioner, John Wilbur McFadden, M.D., respectfully petitions this Court to issue a writ of certiorari to review the judgment of the Supreme Court of Mississippi in favor of Respondent, Mississippi State Board of Medical Licensure.

OPINIONS BELOW

The Supreme Court of Mississippi affirmed the decision of the Chancery Court of Hinds County, Mississippi in an opinion which has not yet been officially published, but is published as *McFadden v. Mississippi State Board of Medical Licensure*, No. 97-CC-01410-SCT, 1999 WL 47785 (Miss. Feb. 4, 1999). Dr. McFadden timely filed a motion for rehearing before the Supreme Court of Mississippi, which was denied by an unpublished order entered on April 15, 1999.

The unpublished opinion and order of the Chancery Court of Hinds County, Mississippi, affirming the decision of the Mississippi State Board of Medical Licensure as well as the opinion and order of the Board are included in the appendix to this petition.

STATEMENT OF JURISDICTION

The Supreme Court of Mississippi entered judgment on February 4, 1999. Dr. McFadden filed a timely motion for rehearing, which was denied by order entered on April 15, 1999. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Due Process Clause of Section 1 of Amendment XIV to the Constitution of the United States, which provides, in pertinent part, that no state shall "deprive any person of life, liberty or property, without due process of law. . . ."

STATEMENT OF THE CASE

This action was instituted by the Mississippi Board of Medical Licensure ("the Board") to sanction John Wilbur McFadden, Jr., M.D., a physician licensed to practice in the State of Mississippi. Dr. McFadden's practice is concentrated in the field of pain management, primarily through the administration of narcotics. The Board charged Dr. McFadden with violation of medical standards, on primary allegations that he had: (1) over-prescribed pain medications to certain patients; and (2) prescribed pain medications without adequately documenting his examinations and diagnoses that would justify administration of the medication.

Dr. McFadden seeks review of the decision of the Supreme Court of Mississippi, in which that court upheld the Board's order stripping Dr. McFadden of the authority to write prescriptions for controlled substances, which effectively terminated Dr. McFadden's right to practice in his chosen field.

A. Prior Proceedings In This Case

The charges against Dr. McFadden were brought by means of an affidavit prepared by an investigator who was

employed by the Board and assisted by the Board's medical consultant. The hearing on those charges was held on November 21-22, 1996. Following the hearing, the Board issued its Determination and Order dated November 22, 1996. [App., pp. 60a-96a].

Dr. McFadden filed a timely appeal to the Chancery Court of Hinds County, Mississippi, contending, *inter alia*, that he had been denied due process of law. The Chancery Court affirmed the decision of the Board by Opinion entered on October 8, 1997. That part of the court's opinion addressing Dr. McFadden's due process arguments may be found at pages 46a through 52a of the Appendix.

Dr. McFadden then filed a timely appeal to the Supreme Court of Mississippi. That court affirmed the decision of the Chancery Court by opinion entered on February 4, 1999. *McFadden v. Mississippi State Board of Medical Licensure*, No. 97-CC-01410-SCT, 1999 WL 47785 (Miss. Feb. 4, 1999) That court's analysis of Dr. McFadden's due process claims appears at pages 29a through 37a of the Appendix. Dr. McFadden then filed a timely motion for rehearing, which was denied by Order entered on April 15, 1999. [App., p. 97a].

REASONS FOR GRANTING THE WRIT

The opinion of the Supreme Court of Mississippi is in conflict with prior decisions of this Court and the federal courts of appeals in two important respects. First, although the Supreme Court of Mississippi recognized that "[w]hile several comments made by the Board members could fairly be characterized as hostile," it held that even open hostility toward Dr. McFadden and his witnesses did not provide

evidence of bias which would render the hearing fundamentally unfair. In reaching this conclusion the court failed to factor in that it was dealing with an administrative hearing in which investigative, accusative and adjudicative functions were combined in the same board.

The court addressed Dr. McFadden's complaint concerning the combination of functions as if it were a wholly separate issue and dismissed it, citing *Withrow v. Larkin*, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975). It then addressed whether the statements made by Board members during the course of the hearing evidenced actual bias. This approach, treating the two as separate issues, is clearly contrary to the approach taken by the federal courts of appeal, which have read *Withrow* as standing for the proposition that "Where, however, evidence casts doubt on the partiality of the [hearing officer] the combination of prosecutorial and adjudicatory functions in a single person can present due process concerns." *Wildberger v. AFGE*, 86 F.3d 1188, 1195 (D.C. Cir. 1996). The evidence in the case *sub judice* certainly casts doubt on the impartiality of the hearing officers.

Furthermore, in relying on *Withrow*, the Supreme Court of Mississippi ignored critical differences in the facts in *Withrow* and the facts in this case. In *Withrow*, this Court pointed out that although the same agency conducted both the hearing to determine whether charges would be brought and the dispositive hearing on those charges, the panels at each of those hearings consisted of different individuals within that agency. Here, the medical consultant who assisted in the investigation of Dr. McFadden, and who actually selected the four patient files which were to be reviewed by the Board, sat with the Board during the

hearing, and fully participated with the Board in making its findings of fact reaching its ultimate opinion.

Second, there was missing in *Withrow* any evidence that the board members had prejudged the case based on their pre-knowledge of some of the evidence. Here, there is overwhelming evidence of such prejudgment in the statements made by the Board members during the course of the "adversary hearing leading to ultimate decision." Throughout the course of the hearing, the Board members continuously interrupted testimony being given or elicited by Dr. McFadden to interject criticisms of the witnesses and of the medical theories being presented by them. For instance, Board members interrupted the testimony of Dr. McFadden's expert witness, who is imminently qualified in the field of pain management, to tell him that his method was "dishonorable" and that he was "wrong." The board members did not weight the evidence; they chastised the witnesses trying to present it, in accordance with their own predetermined conclusions.

After being cross-examined by the licensed attorney who served as prosecutor for the Board, each of Dr. McFadden's witnesses was attacked by virtually all of the panel members. Dr. McFadden was told during the course of this "cross-examination" by the judges, that he was "dangerous," that he was being cruel to his patients, that his testimony was "meaningless," and that the panel did not want Dr. McFadden's theories on fibromyalgia[1]. One

1. This was a significant comment because Dr. McFadden was charged with failing to make diagnoses which would justify his findings of intractable pain. Fibromyalgia was one of the diagnoses that Dr. McFadden had made, but the panel did not even want to hear his testimony regarding that condition and the pain that can result from it.

panel member even suggested that Dr. McFadden was using drugs, an accusation for which there was no supporting evidence. Another member of the panel summed up the prevailing attitude by stating during questioning that Dr. McFadden would never convince him, although the burden of proof was on the Board as a matter of state law to prove by clear and convincing evidence that Dr. McFadden had violated standards.

The panel members also took advantage of every opportunity to present evidence, although none of them took the witness stand or was in any way subject to being cross-examined. Panel members gave their opinions on depression, suicide, addictionology, and problems with alcoholism. One panel member offered his opinion that pain is not always bad and that Dr. McFadden might actually be hurting his patients by preventing them from feeling their pain, although there was no evidence that such was the case with regard to any of the patients whose treatment was under review. Yet another member of the panel offered his opinion that Ultram, a non-narcotic drug, had a potential for abuse and when Dr. McFadden tried to respond, told him, "I don't care what a detail man's telling you."

During the panel's questioning of Dr. McFadden's expert witness, one of the panel members gave what he described as his "presentation," which covered more than four pages in the transcript. The gist of the speech was that doctors who practice pain management are playing a con game with the medical profession, and are being conned by their addicted patients. There is a raging debate in the medical community in this country between those who advocate the long-term use of opioids for the treatment of intractable pain and those who oppose such treatment except

in terminally ill cancer patients.[2] Dr. McFadden is a leading advocate of the use of narcotics to try to return patients who suffer from pain that cannot be surgically relieved to some semblance of normal functioning. The members of this Board, almost to a person, during the course of the hearing made it clear that they came down on the opposite side of this debate. There was absolutely no evidence that Dr. McFadden was selling drugs to his patients for their recreational use or for them to resell. In fact, no such allegation was made. All of the experts who testified, including the expert retained by the Board, agreed that Dr. McFadden had acted in what he believed to be the best interests of his patients. The Board's expert witness agreed that what we had here was a difference of medical opinion about the administration of large amounts of narcotics over a long period of time. Because of this difference of opinion, Dr. McFadden has been stripped of the privilege of practicing in his chosen field of medicine, and found guilty of "dishonorable or unethical conduct likely to deceive, defraud or harm the public."

There was even further evidence of the Board's prejudgment of Dr. McFadden in the fact that although all of the experts called to testify at the hearing, including the lone expert called by the Board, testified that Dr. McFadden had made adequate examination of the patients whose treatment was under review and had kept adequate records of the medications prescribed, the Board, in its findings did nothing more than adopt the charges which it had filed against Dr. McFadden.

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2. The American Pain Society and the American Academy of Pain Medicine filed a joint brief in support of Dr. McFadden in the Supreme Court of Mississippi as *amici curiae*.

The Supreme Court of Mississippi, in its opinion, did not even address Dr. McFadden's argument that a due process violation occurs when hearing officers base their decision on evidence which they have interjected into the proceeding without right of cross-examination. *See, e.g., Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964).

Dr. McFadden was denied due process by a Board that acted as investigator, prosecutor, unsworn witnesses immune to cross-examination, judge, and jury, which was openly hostile to Dr. McFadden; his witnesses and the evidence he attempted to introduce; and which, in the end, did nothing more than rubber-stamp the charges which had been lodged against Dr. McFadden, even though the testimony of the Board's own expert showed the charges to be unsupported.

CONCLUSION

Issuance of a writ of certiorari is appropriate to correct the erroneous ruling of the Supreme Court of Mississippi, which is in conflict with the opinion of this Court in *Withrow v. Larkin*, and with the opinions of the United States Courts of Appeals cited herein.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF MISSISSIPPI DATED FEBRUARY 4, 1999

John Wilbur McFADDEN, Jr., M. D.

v.

MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE.

No. 97-CC-01410-SCT

Supreme Court of Mississippi.

Feb. 4, 1999.

* * *

BEFORE SULLIVAN, P.J., and McRAE and JAMES L. ROBERTS, Jr., JJ.

SULLIVAN, Presiding Justice, for the Court

STATEMENT OF THE CASE

¶ 1. This is an appeal from the October 14, 1997, judgment of the Hinds County Chancery Court affirming the November 22, 1996, decision of the Mississippi Board of Medical Licensure suspending Dr. McFadden's medical license indefinitely but automatically staying the suspension subject to numerous probationary conditions that severely restrict, or in some circumstances, prohibit his privileges to prescribe controlled substances.

Appendix A

STATEMENT OF THE FACTS

1. Dr. McFadden

¶ 2. Dr. McFadden is a physician licensed to practice medicine in the State of Mississippi, currently holding License No. 05129. Dr. McFadden considers himself a specialist in the treatment of severe, chronic pain. He is a founding member of the Southern Pain Society and the American Academy of Pain Medicine. Dr. McFadden has written on the treatment of pain and has lectured in the United States and abroad on the subject.

2. Records Seized

¶ 3. In March 1996, investigators with the Board of Medical Licensure visited Dr. McFadden's clinic in Tupelo, Mississippi, in order to execute an administrative inspection and search warrant.. The search warrant, obtained pursuant to the Uniform Controlled Substances Act, Miss.Code Ann. § 41-29-101 et seq., permitted the investigators to obtain and review the medical records of selected patients under Dr. McFadden's care. Following routine prescription profiles of pharmacies in the Tupelo area, thirty six patients had been identified as receiving usually large quantities of controlled substances through prescriptions issued by Dr. McFadden. The investigator presented four of these patient files to the Board for review at the November 21 and 22, 1996 hearing on this matter. The patient files presented were those of Dwight Kee, Priscilla Lovelace, Jeffrey Gilmore, and Jackie Tate.

Appendix A

3. Background Facts

¶ 4. In its affidavit for the administrative inspection and search warrant, the Board asserted the following underlying facts establish probable cause for the March 1996 search and seizure of Dr. McFadden's patient files:

a. In March 1997, Dr. McFadden was investigated by the Board for issuing suspicious amounts of prescriptions for Codeine based products and diet pills.

b. In June 1987, he was investigated for excessive purchases of Schedule III controlled substances and issued a Letter of Admonition by the United States Drug Enforcement Administration (DEA) for numerous violations of state and federal controlled substance law.[1]

c. In February, 1989, the Board received a complaint from the Amory, Mississippi Police Department concerning Dr. McFadden prescribing large quantities of Propoxyphene to known drug abusers in the Amory area.

d. In December 1991, pharmacy profiling by the Board documented suspicious quantities of Codeine, Hydrocodone and Propoxyphene prescriptions being issued by Dr. McFadden to patients in the Tupelo area.

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1. In April 1988, a follow-up inspection to the DEA investigation revealed that all corrective measures outlined in the letter of admonition were identified as being maintained by Dr. McFadden.

Many of these patients were suspected or known drug abusers.

e. In April 1992, investigators performed a review of selected patient files identified as receiving suspicious quantities of controlled substances prescriptions from Dr. McFadden. Seven patient medical files were reviewed. All patients were identified as having some type of drug use/abuse. Several patients were noted as receiving suspicious amounts of controlled substances for long periods of time. In addition, many of the prescriptions issued were not properly documented in the charts. Investigators also conducted a follow-up inspection to an audit and inspection performed by the Board and the DEA in 1988. As a result of this visit, the Board's previous Executive Officer Frank J. Morgan, Jr., M.D., contacted Dr. McFadden in writing warning him to properly document patient records and monitor patients who exhibit symptoms of chemical dependency. The letter also warned Dr. McFadden that his prescribing habits would continue to be monitored by the Board.

f. In April 1995, the Board was contacted by a member of the Lee County Sheriff's Department concerning Dr. McFadden issuing narcotic prescriptions to known drug abusers.

g. Also in April 1995, the Board was contacted by the Tupelo Police Department concerning a possible diversion of controlled substance samples from Dr. McFadden's clinic. Dr. McFadden was described as

reluctant to cooperate with the police officers in their investigation of the theft.

4. The Complaint

¶ 5. The current charges against Dr. McFadden are set forth in an 11-count affidavit or complaint. Specifically, the Board charges Dr. McFadden with (1) failing to maintain complete records of examination, evaluation, and treatment of patients, including the alleged failure to document a diagnosis that would justify prescribing controlled substances; (2) prescribing controlled substances without a good faith examination of the patients; (3) prescribing addictive medications "otherwise than in the course of legitimate professional practice"; and (4) unprofessional conduct, including "conduct likely to deceive, defraud or harm the public."

5. The Board Hearing

¶ 6. On November 21 and 22, 1996, Dr. McFadden appeared before the Board. The Board's witnesses included the investigator, Mr. Thomas Washington, and a neurosurgeon, Dr. Bernard Patrick. After counsel for the Board rested, Dr. McFadden moved for a directed verdict, but his motion was denied. Dr. McFadden's witnesses included Dr. McFadden, Dr. George McGee, Dr. David McKellar, Dr. Daniel Brookhoff, and three of the four patients whose files were presented to the Board.

¶ 7. The testimony offered by the investigator, Mr. Washington, centered on a description of his search and a

recitation of the information stated in the affidavit for administrative inspection and search warrant. On cross examination, Mr. Washington admitted he did not interview any of Dr. McFadden's patients and he did not speak with Dr. McFadden about any of his patients.

¶ 8. Dr. Patrick appeared as the Board's expert witness. Asked his opinion as to the proper management of chronic pain, Dr. Patrick stated he prefers to limit the patient's movement and, when necessary, use chronic medications preferably in the category of the nonsteroidal anti-inflammatory agents. Dr. Patrick further testified that patients who often have recurring exacerbations may require short term opioid[2] medications. He also stated that in his experience, patients with pain of spinal or vertebral origin seldom require the stronger opioid medications (such as Morphine and Demerol) and only then for a day or two. Dr. Patrick also testified that the overwhelming majority of patients who need short term opioid therapy can be treated with Codeine or Codeine-equivalent drugs such as Oxyhcodone and Hydrocodone. He added that it is quite rare that such patients require chronic opioid medications for a prolonged period of time.

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2. "Opioids" constitute a class of natural and synthetic substances used medicinally to control pain. Although the term was originally used to refer only to synthetic compounds chemically similar to the natural opioids, such as methadone, current usage includes natural substances derived from the sap of the opium poppy, such as morphine and codeine. See Marc Galanter & Herbert Kleber, Textbook of Substance Abuse Treatment 191 (1994) (editors' note).

¶ 9. Dr. McFadden testified that he regularly uses opioids in the treatment of patients with intractable pain. Dr. McFadden insisted that, contrary to what is charged in the complaint, he made a prior determination when nonaddictive substances would be effective. Dr. McFadden also stated that all medications were prescribed to his patients in the course of legitimate professional practice.

¶ 10. Dr. McGee, a general surgeon, serves on the Advisory Council for the American College of Surgeons, as Vice Chair of the Council on Managed Pain and Development, as Speaker of the House of Delegates at the Mississippi State Medical Association, and previously as Speaker of the House of Delegates for the American Society of General Surgeons. Dr. McGee described Dr. McFadden as a trustworthy physician who takes meticulous care of his patients.

¶ 11. Dr. McFadden also offered the expert testimony of Dr. McKellar, a pain medicine specialist. Dr. McKellar testified that he regularly prescribes opioids for patients in intractable pain. Dr. McKellar also testified that he had reviewed the four patient files at issue, and in his opinion, Dr. McFadden's prescription of controlled substances for these patients was done in the course of legitimate medical practice. Dr. McKellar further testified that his review of the patient files revealed that Dr. McFadden had carefully monitored these patients and that the patients appeared to have suffered no harm under Dr. McFadden's care. While Dr. McKellar admitted he had not examined these patients, he stated that a review of the four patient files indicated that Dr. McFadden's treatment and evaluation of these four

patients was reasonable and that Dr. McFadden had conducted a good faith examination of these patients. Dr. McKellar also stated that he thought Dr. McFadden's level of referrals to other doctors for alternative treatments indicated an admirable level of professionalism.

¶ 12. Dr. Brookhoff, another pain medicine specialist, also testified on behalf of Dr. McFadden. Dr. Brookhoff is board certified in internal medicine and medical oncology. He conducts frequent seminars and other meetings on pain management, has published numerous medical journals, and has written several book chapters concerning the treatment and management of pain. Like Dr. McKellar, Dr. Brookhoff examined the four patient files at issue. Dr. Brookhoff testified that in his opinion, Dr. McFadden's treatment of these patients was "in the course of legitimate medical practice," and it did not appear that any of these patients suffered any physical harm as a result of the controlled substances prescribed by Dr. McFadden. Dr. Brookhoff stated that it was his professional opinion that the controlled substances prescribed by Dr. McFadden were not excessive and that, for the most part, the medications prescribed by Dr. McFadden were very low potency medications. According to Dr. Brookhoff, Dr. McFadden's practice of referring patients to other physicians for second opinions and alternative or supplemental treatment suggests that Dr. McFadden was open to receiving advice and assistance from colleagues and that he was not keeping any secrets.

¶ 13. Three of the four patients at issue also testified at the hearing. Priscilla Lovelace, a charity patient who suffers from a lower back injury, testified that Dr. McFadden

is an attentive doctor and that without his treatment, she "would continue using the emergency rooms to seek relief."

¶ 14. Jackie Tate testified that he suffers from constant pain in his right leg and his back, but other doctors are afraid to operate at his time for fear it may worsen his condition. Mr. Tate testified that Dr. McFadden has referred him to other doctors and that Dr. McFadden monitors his medications, counsels him, and personally examines him approximately every six weeks.

¶ 15. Dwight Kee testified that he suffers from back pain which radiates down his right arm, numbness in his fingertips, neck pain and severe headaches. According to Mr. Kee, he has seen orthopedists, neurologists, pain specialists, psychiatrists, internists, as well as, his family doctor in an attempt to obtain some relief. Mr. Kee stated that he talks with Dr. McFadden on the average of twice a week and that Dr. McFadden has made home visits to see him when necessary.

¶ 16. Mr. Kee further testified that parts of the affidavit which suggest he misused his medications were false. Mr. Kee stated that he once had a two week meeting in Chicago, and consequently, it was necessary for him to obtain sufficient medication from Dr. McFadden for the trip. Mr. Kee also refuted the charge in the affidavit stating that Dr. McFadden placed him on a regimen of controlled substances without a prior determination that nonaddictive substances were ineffective. Mr. Kee explained that he had tried various non- controlled substances before he was prescribed controlled substances by Dr. McFadden. Mr. Kee concluded

his testimony by stating that he received better treatment from Dr. McFadden than most doctors he had seen.

6. The Board's Order

¶ 17. Following the evidentiary hearing, the Board unanimously found Dr. McFadden guilty of the following:

> Three counts of violating Section 73-25-29(1)(m) and appellee's Rules and Regulations, Section IV.E "Pertaining to Prescribing, Administering and Dispensing of Medication," for failing to maintain a complete record of the examination, evaluation, and treatment, including documentation of the diagnosis and reason for prescribing controlled substances;
>
> Four counts of violating Section 73-25-29(1)(m) and appellee's Rules and Regulations, Section IV.F "Pertaining to Prescribing, Administering and Dispensing of Medication," for prescribing a controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith examination or medical indication thereof; and
>
> Four counts of violating Section 73-25-29(1)(c), Section 73-25-29(1)(h)(iv), and Section 73-25-83(a) for prescribing drugs having addiction-forming or addiction-sustaining liability, otherwise than in the course of legitimate professional practice and being guilty of unprofessional conduct, which includes dishonorable or unethical conduct likely to deceive, defraud or harm the public.

For these violations, the Board suspended Dr. McFadden's medical license indefinitely, subject to an automatic stay conditioned on the following probationary terms:

> No permission to order, manufacture, distribute, possess, dispense, administer or prescribe any controlled substances listed in Schedules II, IIN, III, IIIN, and IV to any patient on an out-patient basis, until authorized to do so by prior written order of the Board, except for emergency-room treatment on condition that Dr. McFadden personally examines the patient and makes a determination as to the need thereof;
>
> No permission to order, manufacture, distribute, possess, dispense, administer or prescribe the medications Stadol, Nubain, Soma, Butalbital, and Dalgan to any out-patient, until authorized to do so by prior written order of the Board, except for emergency room treatment (as above);
>
> Compliance with all federal, state and local law regarding the practice of medicine, and the Board's rules pertaining to prescribing, administration and dispensing of medication;
>
> Periodic surveillance of Dr. McFadden's medical practice by the Board;
>
> Continuing medical education (50 hours annually), including the course entitled "Physician Education Program in Clinical, Legal and Ethical Issues in Prescribing Abusable Drugs," sponsored by the University of South Florida; and

Ten days' notice if Dr. McFadden leaves Mississippi to reside or practice elsewhere.

¶ 18. The Board's Order further provides Dr. McFadden with the right to petition the Board to release any or all of these probationary conditions after November 22, 2001, and states Dr. McFadden retains full privileges to prescribe controlled substances in Schedule V, with the exception of Buprenex.

¶ 19. Dr. McFadden appealed the Board's decision to the Hinds County Chancery Court. After the Chancery Court affirmed the Board's decision, Dr. McFadden brought the instant appeal raising two issues for the Court's consideration:

I. WHETHER THE DECISION OF THE BOARD WAS SUPPORTED BY SUBSTANTIAL EVIDENCE FOUND TO BE CLEAR AND CONVINCING OR WHETHER IT WAS ARBITRARY OR CAPRICIOUS?

II. WHETHER THE BOARD DENIED DR. McFADDEN'S CONSTITUTIONAL RIGHTS OF DUE PROCESS OF LAW GUARANTEED TO HIM BY BOTH THE CONSTITUTION OF THE STATE OF MISSISSIPPI AND THE UNITED STATES CONSTITUTION?

Appendix A

LEGAL ANALYSIS

¶ 20. Judicial review of an administrative decision is limited. This Court recognizes that

> [o]ur Constitution does not permit the judiciary of this State to retry de novo matters on appeal from administrative agencies. Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. The appeal is a limited one, however, since the courts cannot enter the field of the administrative agency. The court will entertain the appeal to determine whether or not the order of the administrative agency (1) was supported by substantial evidence, (2) was arbitrary or capricious, (3) was beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. This rule has been thoroughly settled in this state.

Mississippi State Bd. of Nursing v. Wilson, 624 So.2d 485, 489 (Miss.1993) (quoting Mississippi State Tax Comm'n v. Mississippi-Alabama State Fair, 222 So.2d 664, 665 (Miss.1969)).

¶ 21. "The only grounds for overturning administrative agency action by the appellate process is that the state agency has acted capriciously, unreasonably, arbitrarily; has abused its discretion or has violated a vested constitutional right of a party. Wilson, 624 So.2d at 489 (quoting Melody Manor Convalescent Center v. Mississippi State Department of Health, 546 So.2d 972, 974 (Miss.1989)).

¶ 22. "Moreover, there is a rebuttable presumption in favor of the action of an administrative agency and the burden of proof is upon one challenging its action." Wilson, 624 So.2d at 489 (quoting County Board of Education of Alcorn County v. Parents and Custodians of Students at Rienzi School Attendance Center, 251 Miss. 195, 168 So.2d 814, 818 (1964)).

¶ 23. While this standard of review is highly deferential, it is by no means a "rubber stamp." See Wilson, 624 So.2d at 490.

Sufficiency of the Evidence

¶ 24. Because the licensure statutes and regulations at issue in this case are penal in nature, the Board is required to prove its case against Dr. McFadden by clear and convincing evidence, and the statutes and regulations at issue must be strictly construed in favor of Dr. McFadden. See Hogan v. Mississippi Bd. of Nursing, 457 So.2d 931, 934 (Miss.1984) "The judicial eye looks to see whether a fair-minded fact finder might have found the evidence clear and convincing that the offense had occurred and where that may be said, we will not disturb the Board's judgment."

Appendix A

Riddle v. Mississippi State Bd. of Pharmacy, 592 So.2d 37, 41 (Miss.1991).

¶ 25. Dr. McFadden complains the Board's administrative decision was not supported by clear and convincing evidence. Dr. McFadden raises issues regarding the accuracy of Mr. Washington's affidavit, particularly the method used to calculate the dosages of controlled substances prescribed[3], the Board's findings of fact, and the relative credibility and weight to be accorded each party's witnesses, particularly the expert witnesses. Dr. McFadden's concerns about the accuracy of Mr. Washington's affidavit will be discussed below when we address Dr. McFadden's claim that he was denied his right to due process of law. The Court will now address Dr. McFadden's concerns about the Board's findings of fact and the relative credibility and weight to be accorded the parties' witnesses.

¶ 26. Issues of fact and credibility are the primary responsibility of the trier of fact. Accordingly, this Court should not reweigh the facts nor substitute its judgment for

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3. Specifically, Dr. McFadden complains the method employed by the Board was simply a counting of pills and such a method fails to recognize that many of the prescriptions can be dispensed in various strengths, i.e., 15 mg to 300 mg. Dr. McFadden claims he consistently prescribed the lower strengths. He also complains the investigator failed to count the days of the last prescriptions, thereby rendering the entire calculation wrong. Finally, Dr. McFadden claims the investigator failed to recognize that many of the prescriptions at issue could be taken at the same time.

that of the fact finder as to credibility issues. The reviewing court "is only concerned with the reasonableness of the administrative order, not its correctness." Mississippi Dep't of Envtl. Quality v. Weems, 653 So.2d 266, 281 (Miss.1995). The question is simply "whether substantial evidence supports the findings made by the agency." Id.

¶ 27. The Board contends more than sufficient evidence was presented to the Board to satisfy the "substantial credible evidence" standard by which decisions of administrative boards are reviewed in Mississippi. The Board outlines the following facts for this Court's consideration:

Dwight Kee

¶ 28. During the period of February 24, 1995, through Janauary 2, 1996, Dr. McFadden issued to Mr. Kee fifty-six separate (56) prescriptions for a total of 2,998 dosage units of controlled substances. On at least twenty one (21) separate occasions Dr. McFadden issued prescriptions for controlled substances to Mr. Kee at a time when the patient would not have been finished taking the same drug from a prior prescription issued by Dr. McFadden had the patient followed Dr. McFadden's own instructions as to daily rate of consumption for the drugs. Mr. Kee testified that he expressed concern to Dr. McFadden and other doctors about the drugs he was consuming and the fact that he may have a drug abuse problem. Dr. McFadden's medical records contain no reference to Mr. Kee's requests for premature refills (a probable indication that the patient is being oversupplied with medication) and no reference to Dr.

McFadden's conclusion that Mr. Kee was the "best candidate for suicide of any patient in my practice."

¶ 29. During the profile period, Dr. McFadden issued fifteen (15) prescriptions to Mr. Kee in which Dr. McFadden recorded into the patient's medical record only the type of drug and quantity described. In each of these fifteen (15) instances, Dr. McFadden failed to record the patient's vital signs, any observation of the patient's condition, or how the patient was progressing under his treatment plan. Dr. McFadden also issued Mr. Kee an additional eight (8) prescriptions for controlled substances with no corresponding entry whatsoever in the patient's medical record.[4] The Board argues Dr. McFadden's failure to record the issuance of a prescription and his failure to document the vital signs/observations regarding the patient into the patient's medical record violates Section IV.E and Section IV.F of the Board's rules and regulations "Pertaining to Prescribing, Administration, and Dispensing of Medication."

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4. Section IV.E of the rules and regulations requires that when a physician issues a prescription for controlled substances, he must not only enter the name, dose, strength and quantity of the controlled substance, but he must also show a complete record of the examination, evaluation, and treatment of the patient. Comment One of the Board's rules and regulations advises physicians that the "failure to record in patient file prescriptions for controlled substances issued or failure to record patient visits" is one of the criteria which the Board considers when determining whether a "good faith prior examination or medical indication" exists.

Appendix A

Patricia Lovelace

¶ 30. Between January 3, 1995, and January 26, 1996, Dr. McFadden issued Ms. Lovelace sixteen (16) prescriptions for a total of 2,700 dosage units of controlled substances. A review of Ms. Lovelace's medical record indicates she was avoiding surgery which could have alleviated her pain, and instead, she requested additional quantities of specific types of controlled substances, which Dr. McFadden prescribed. The Board claims this type of activity constitutes a "red flag" suggesting possible drug abuse. As to nine (9) of the sixteen (16) prescriptions issued to this patient, Dr. McFadden recorded in the patient's record only the name of the drug and quantity issued. Dr. McFadden failed to record any reference to the patient's vital signs, any observation of the patient's condition, or any information as to the status of the patient's course of treatment. The Board argues such omissions are violations of Section IV.E and Section IV.F of the Board's rules and regulations "Pertaining to Prescribing, Administration, and Dispensing of Medication."

Jeffrey Gilmore

¶ 31. Between January 12, 1995, and January 12, 1996, Dr. McFadden issued to Mr. Gilmore eighteen (18) prescriptions for a total of approximately 2,250 dosage units of controlled substances. In denying this patient's claim for permanent disability for workers' compensation, the Administrative Law Judge specifically found that Mr. Gilmore was "doctor shopping" for a disability rating when he initially consulted Dr. McFadden in November, 1994.

The Administrative Law Judge also found that Dr. McFadden was known as a "physician who will render extended treatment based on a patient's subjective complaints of pain," and further found that Dr. McFadden's choice of treatment "was not required by the nature of [Gilmore's] injury. . . ." Of the eighteen prescriptions Dr. McFadden issued to Mr. Gilmore during the profile period, four (4) of them were issued with no corresponding entry in the patient's medical record. As to nine (9) of the other prescriptions, Dr. McFadden merely recorded the name of the drug and the quantity prescribed. The Board argues this is yet another violation of Section IV.E and Section IV.F of the Board's rules and regulations.

Jackie Tate

¶ 32. Between January 4, 1995, and January 16, 1996, Dr. McFadden issued thirty one (31) prescriptions for a total of 3,036 dosage units of controlled substances to Mr. Tate. Dr. McFadden described this patient as "one of the top 4 or 5 possible suicide candidates in my practice", yet he failed to refer this patient to a specialist for a psychiatric evaluation. Instead, Dr. McFadden continued to prescribe Mr. Tate an average of eight (8) dosage units of narcotics per day and, at times, up to thirteen (13) dosage units per day.

¶ 33. The Board claims Dr. McFadden also issued these prescriptions at a time when he knew or should have known of the patient's possible drug abuse. Nineteen (19) of the thirty one (31) prescriptions issued during the profile period were issued early, i.e., at a time when the patient would

still have had the medication if he were consuming it at the proper daily rate.

¶ 34. Eight (8) of the thirty one (31) prescriptions Dr. McFadden issued to Mr. Tate were issued with no corresponding entry in the patient's medical record. Dr. McFadden also issued this patient an additional ten (10) prescriptions in which he recorded only the drug and quantity prescribed, i.e., Dr. McFadden failed to record the patient's vital signs, any observation of the patient's condition, or any notation concerning the status of the patient's treatment plan. The Board concludes these practices are violations of Section IV.E and IV.F of the Board's rules and regulations "Pertaining to Prescribing, Administration and Dispensing of Medication."

¶ 35. The Board argues the above facts demonstrate that it reasonably concluded Dr. McFadden was in violation of the rules and regulations of the Board "Pertaining to Prescribing, Administration and Dispensing of Medication." The Board argues these facts also support the Board's conclusion that Dr. McFadden prescribed drugs having addiction-forming or addiction-sustaining liability otherwise than in the course of legitimate professional practice. The Board further concludes that this pattern of behavior, which Dr. McFadden continued to engage in after being warned by the Board, constituted unprofessional conduct, including dishonorable or unethical conduct likely to harm the public.

¶ 36. More specifically, the Board concludes the evidence presented at the hearing revealed that [illegible] at least

forty three (43) separate occasions Dr. McFadden prescribed controlled substances without maintaining a complete record of his examination, evaluation, and treatment of the patient, including a documentation of his diagnosis and reason for prescribing, dispensing, or administering the controlled substance in violation Section IV. E. The Board also concludes that on an additional twenty (20) occasions, Dr. McFadden made no entry whatsoever in the patient's medical record to reflect that he had issued the patient a prescription for controlled substances. The Board also points out that these omissions on the part of Dr. McFadden took place after the Board's 1992 warning letter reminding him of his duty to comply with the Board's rules and regulations. The Board asserts that on this basis alone, its decision to suspend Dr. McFadden's license to practice medicine in this State was supported by substantial credible evidence.

¶ 37. The Board also claims Dr. McFadden's forty (40) violations of Section IV.F justify its action in restricting his license to practice medicine. This Section of the Board's rules and regulations "Pertaining to Prescribing, Administration and Dispensing of Medication" provides that "[n]o physician shall prescribe, administer or dispense any controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith prior examination and medical indication therefore." The Official Comment to this Section states that:

> proper medical practice require[s] that, upon any encounter with a patient, in order to establish proper diagnosis and regimen of treatment, a physician must take three steps: (a) take and

> record an appropriate medical history, (b) carry out an appropriate physical examination, and (c) record the results. The observance of these principles as a function of the 'course of legitimate professional practice' is particularly of importance in cases in which controlled substances are to play a part in the course of treatment."

Section IV.F, Official Comment. (emphasis added). The Official Comment further states that in determining whether a physician acted in "good faith" in issuing prescriptions for controlled substances, the Board will look to whether "the physician dispens[ed] drugs to patients having no medical need, when the physician knew or should have known that the patients were addicts" and "repeated refills over relatively short periods of time or the issuance of prescriptions at a time when the patient should not have been finished taking the same medication from a prior prescription had the prescription directions been properly followed or the correct dosage taken." Section IV.F., Official Comment. The Board asserts that in the cases of patients Mr. Kee and Mr. Tate, Dr. McFadden prematurely issued at least forty (40) prescriptions for controlled substances.

¶ 38. Furthermore, according to the Board, Dr. McFadden's one hundred and three (103) violations of Section IV.E and Section IV.F constitute "dishonorable or unethical conduct likely to deceive, defraud or harm the public." Section 73-25-29(8)(d) of the Mississippi Code states that "unprofessional conduct" such as "dishonorable

or unethical conduct likely to deceive, defraud or harm the public" constitutes grounds for the Board to suspend, revoke or restrict a physician's license to practice medicine in Mississippi. Miss.Code Ann. § 73-25-29(8)(d); See also Miss.Code Ann. § 73-25-83(a) (authorizing the Board to discipline a physician for dishonorable or unethical conduct likely to deceive, defraud or harm the public). In its November 22, 1996, Order, the Board concluded that Dr. McFadden's repeated violations of the rules pertaining to controlled substance record keeping/patient monitoring constituted "unprofessional conduct" within the meaning of Section 73-25-29(1).

¶ 39. The Board also notes that under Section 73-25-29(13) "[v]iolations of any provision(s) of the Medical Practice Act or the rules and regulations of the [B]oard or of any order, stipulation or agreement with the [B]oard" are action giving the Board authority to suspend, revoke or restrict a physician's license to practice medicine in Mississippi. Miss.Code Ann. § 73-25-29(13). The Board argues that its disciplinary sanctions against Dr. McFadden were clearly authorized by these statutes governing such actions.

¶ 40. The Board further asserts that the expert testimony offered at the hearing clearly established that Dr. McFadden's prescribing practices were outside the course of legitimate professional practice and amounted to unprofessional conduct. The Board's expert Dr. Patrick concluded that Dr. McFadden had issued prescriptions outside the course of legitimate professional practice to each of the four patients at issue. Dr. Patrick also concluded that

Dr. McFadden issued prescriptions for controlled substances without proper medical indication when he stated that "in virtually every case here, certainly three of the four cases, there was just insufficient [medical] evidence to put these patients even on short-term opioid [controlled substances], because the diagnosis is either controversial or nonexistent." Dr. Patrick further concluded that Dr. McFadden's prescribing practices amounted to unprofessional conduct likely to harm the public. Concerning Ms. Lovelace, Dr. Patrick concluded that "[i]t is inconceivable to me that a knowledgeable physician would place such a patient on six to seven Tylenol Number 3's per day for long-term ongoing management of a pain problem diagnosed as fibromyalgia." Regarding Mr. Gilmore, Dr. Patrick concluded that the volume of controlled substances Dr. McFadden prescribed "was totally inappropriate." Concerning the volume of controlled substances prescribed to Mr. Tate, Dr. Patrick stated he "could not find adequate basis [or] anything appropriate about that."

¶ 41. Finally, the Board alleges that Dr. McFadden's own admissions support the Board's decision to suspend his medical license. The Board notes that Dr. McFadden is a "self trained" pain medicine specialist. The record reveals Dr. McFadden had no residency or internship training in any speciality which involves the practice of pain management, i.e., anesthesiology, neurosurgery, neurology, orthopaedics, etc. Dr. McFadden is a pediatrician by formal medical training.

¶ 42. The Board also argues that during his testimony Dr. McFadden acknowledged having issued prescriptions

for controlled substances with directions to the patient that were contrary to the maximum daily dosages set forth in the Physicians' Desk Reference (i.e., he told Mr. Kee to take one to two Vicodin ES every four to six hours). The Board claims that Mr. Kee could have taken up to six Vicodin ES per day per Dr. McFadden's directions. The Board states that the maximum daily dosage recommended by the Physicians' Desk Reference for Vicodin ES is five per day, i.e., the specific warning being that "[t]he total 24 hour dose should not exceed five tablets."

¶ 43. The Board also directs this Court's attention to Dr. McFadden's admission that the advice contained in the Board's 1992 warning letter concerning his controlled substance prescribing/patient monitoring practices was good advice and Dr. McFadden's comment that he "knew all that . . . and was carrying out most of that." In addition, the Board calls attention to Dr. McFadden's acknowledgment that the Board's rules and regulations concerning patient records require physicians to make a record of the examination, evaluation, and treatment of the patient, including a diagnosis and reason for prescribing any controlled substances. When asked if he understood that "just entering a prescription only" in a patient's file was insufficient, Dr. McFadden responded that he "never understood it that way." Concerning the Board's record keeping/patient monitoring rules, Dr. McFadden further stated that "I had no knowledge that you people wanted something in the record. I'll have to change my whole practice."

¶ 44. The Board also notes that when confronted with the fact that he had issued twenty one (21) premature

prescriptions for controlled substances to Mr. Kee, Dr. McFadden claimed "the problem was the pharmacist here because there is no way that the pharmacist should have filled some of these prescriptions as early as he did. And I have no knowledge that Dwight [Kee] was taking so many of these pills as he was sometimes. So that was a mistake on my part." The Board notes Dr. McFadden's expert Dr. McKellar admitted that two or three premature refills to a patient would indicate there "is a problem," and that 21 premature refills "would be pretty high." Dr. McKellar also stated that premature refills would be "a red flag to you that there's a problem" and could indicate that the patient is hoarding the medication or disbursing it to others.

¶ 45. The Board argues these responses exemplify Dr. McFadden's failure to properly manage patients to whom he was prescribing large quantities of controlled substances having addiction forming qualitites. The Board also states that it is not surprising that Dr. McFadden had "no knowledge that Dwight [Kee] was taking so many of these pills," in light of the fact that he failed to properly record twenty three (23) of the fifty six (56) prescriptions he issued to Mr. Kee during the profile period. The Board also points out that when asked to account for these premature prescriptions, Dr. McFadden tried to place responsibility on the pharmacist who had simply filled the prescriptions according to Dr. McFadden's orders. The Board further notes that regarding Dr. McFadden's nineteen (19) premature prescriptions issued to Mr. Tate, Dr. McFadden acknowledged that the quantity of drugs prescribed was "excessive — if he took it all." In addition, the Board reminds this Court that Dr. McFadden admitted to having

issued prescriptions without the proper record keeping notations in the patient's medical files. Dr. McFadden explained that he failed to maintain his patient files properly because of a "misunderstanding" of the Board's rules and regulations.

¶ 46. The standard of review applicable in the instant case requires this Court to give great deference to the trier of fact concerning issues of fact as well as the credibility of witnesses. As previously stated, the reviewing court "is only concerned with the reasonableness of the administrative order, not its correctness." Weems, 653 So.2d at 281. Based on the substantial evidence discussed above, we conclude that the record supports the reasonableness of the Board's decision to suspend Dr. McFadden's medical license.

¶ 47. Dr. McFadden misconstrues several cases claiming they support his claim that the Board should not have taken this disciplinary action against him. Dr. McFadden cites Miller v. State Bd. of Pharmacy, 262 So.2d 188, 191 (Miss.1972), for the proposition that poor record keeping in the dispensing of controlled substances is, of itself, insufficient to support the revocation of a pharmacist's license. However, in Miller, the administrative board was reversed because "no statute, or rule or regulation of the Board . . . has been cited to us as having established any standards for the keeping of records by pharmacists." Miller, 262 So.2d at 190. The Miller case is distinguishable from the instant case. Dr. McFadden violated Sections IV.E and IV.F of the Board's rules and regulations "Pertaining to Prescribing, Administration, and Dispensing Medication" which clearly establish the standard for physicians in keeping medical records.

¶ 48. Dr. McFadden also relies upon Hogan v. Mississippi Bd. of Nursing, 457 So.2d 931, 935-36 (Miss.1984), in which this Court reversed an administrative board's finding that a nurse had misappropriated controlled substances. However, Hogan involved different statutes and different substantive allegations than those at issue here. Id. at 932-33. In Hogan, the question was whether a nurse misappropriated supplies of controlled substances held by her employer. Id. Here, the question is whether a physician failed to follow the rules requiring him to maintain specific records concerning treatment of his patients. We conclude that Hogan is not controlling here on this issue.

¶ 49. In addition, Dr. McFadden relies upon the foreign jurisdiction cases of McNiel v. Tennessee Bd. of Med. Exam'rs, No. 01-A-01-9608-CH-00383, 1997 WL 92071 (Tenn.Ct.App. March 5, 1997), Johnston v. Department of Prof. Reg., Bd. of Med. Exam'rs, 456 So.2d 939 (Fla.Dist.Ct.App.1984), and In re DiLeo, 661 So.2d 162 (La.Ct.App.1995). The McNiel case involved the question of whether the opinion of a single expert witness constituted substantial, credible evidence that the defendant physicians had overprescribed controlled substances. McNiel, 1997 WL 92071 at *1-3. The Johnston case and the DiLeo case both involved allegations that the defendant physician overprescribed controlled substances to certain patients. Johnston, 456 So.2d at 939-40. However, there was no allegation in any of these cases that the defendant physician failed to maintain proper records of the prescriptions at issue. Hence, we find that Dr. McFadden's reliance on these cases is misplaced.

Appendix A

Due Process

¶ 50. Dr. McFadden argues he was denied a fair and impartial hearing before a neutral tribunal in violation of his constitutional right to due process of law. More specifically, Dr. McFadden contends that he was denied due process of law because "the Board acted as investigator, prosecutor and judge." Dr. McFadden also asserts that "[t]he comments and actions of the Board show that it had abdicated its role as a neutral arbiter and was present simply to assist in proving Dr. McFadden's guilt of the charges made." According to Dr. McFadden, "the questions and commentary by the [Board] members were not to ascertain the true facts regarding Dr. McFadden's administration of controlled substances for patients in intractable pain, but to condemn him." Dr. McFadden claims "[t]he Board repeatedly manifested its bias toward Dr. McFadden and his witnesses throughout the hearing."

¶ 51. Both the United States and Mississippi Constitutions guarantee Dr. McFadden due process of law before an administrative agency. U.S. Const. Amend. XIV; Miss Const. Art. 3, § 4. Administrative proceedings "must be conducted in a fair and impartial manner, free from any suspicion of prejudice, unfairness, fraud or oppression." Mississippi State Bd. of Health v. Johnson, 197 Miss. 417, 19 So.2d 445, 447 (Miss.1944). "Due process always stands as a constitutionally grounded procedural safety net in administrative proceedings." McGowan v. Mississippi State Oil & Gas Bd., 604 So.2d 312, 318 (Miss.1992), cert. denied, 506 U.S. 1052, 113 S.Ct. 976, 122 L.Ed.2d 130 (1993).

¶ 52. Dr. McFadden suggests the combination of investigative and adjudicative functions of the Board resulted in unfairness to him. For example, he complains the medical consultant who assisted in the investigation sat with the Board and fully participated with the Board in making its findings of fact and its ultimate opinion. In support of this argument, Dr. McFadden cites McGowan, 604 So.2d at 316. However, due process is not offended simply because the Board performed both investigative and adjudicative functions. McGowan, 604 So.2d at 315-16; see also Winthrow v. Larkin, 421 U.S. 35, 56, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) (noting "It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedures Act, and it does not violate due process of law.") (footnote omitted). Accordingly, Dr. McFadden's complaint "that the Board acted as investigator, prosecutor and judge" is without merit.

¶ 53. Dr. McFadden also alleges the Board was biased or prejudiced against him, a situation that would be impermissible under both the United States and Mississippi Constitutions. This Court has held "there is a presumption that the officers conducting the hearing and the members of the Board behave honestly and fairly in the conduct of the hearings and in the decision-making process." United Cement v. Safe Air for the Env't, Inc., 558 So.2d 840, 842 (Miss.1990) (citing Harrison County Bd. v. Morreale, 538 So.2d 1196, 1202 (Miss.1989)). "Absent some showing of

personal or financial interest on the part of the hearing officer or evidence of misconduct on the officer's part, this presumption is not overcome." United Cement, 558 So.2d at 842-43.

¶ 54. The Board reminds this Court that administrative hearings are unlike courtroom proceedings, in that the formalities of practice, procedure and evidence are relaxed. See Riddle, 592 So.2d at 43. The Board contends that "a contentious atmosphere can be expected in many administrative hearings, and an attitude bordering on partisanship and even hostility, as reflected in exchanges between the adjudicator and the charged party does not in and of itself prove bias." See 2 Am.Jur.2d, Administrative Law § 50 at 73(1994)(footnote omitted).

¶ 55. At Dr. McFadden's hearing, Board members questioned the witnesses, as is common practice in administrative hearings. While several comments made by Board members could be fairly characterized as hostile, we conclude these comments do not amount to unfair prejudice or bias against Dr. McFadden.

¶ 56. Dr. McFadden misconstrues several comments made by members of the Board and mistakenly reaches the conclusion the Board was biased against him. For example, Dr. McFadden claims that Board member Dr. Richard Riley questioned Dr. McFadden's medical expertise. Dr. Riley's comments, when read in context, reveal that Dr. Riley simply questioned Dr. McFadden's expertise in diskoprophy because Dr. McFadden had previously testified he had no formal training in this speciality, yet he claimed to be "one

of the world experts" in this field. Dr. McFadden also alleges that Dr. Riley wrongfully suggested that Dr. McFadden was "dangerous." Dr. Riley actually questioned whether a lack of formal training might be dangerous.

¶ 57. Dr. McFadden also argues that the Board insinuated that he was not an authority on diseases. However, in response to Dr. McFadden's comment that he is a "world expert" on diskoprophy and an expert on disc disease and spine disease, Dr. Riley's question "what makes you an authority on disc disease and facet disease and spine disease?" does not amount to prejudice or bias against Dr. McFadden.

¶ 58. Dr. McFadden also claims that on two occasions Dr. Riley stated that Dr. McFadden's testimony was "meaningless." Again, Dr. McFadden misconstrues Dr. Riley's statements. Dr. Riley's first comment, "this is meaningless", was in response to Dr. McFadden "speaking 90 miles an hour" about the validity of data he relied upon. The second comment involved a question posed to Dr. McFadden as to what made him an authority on disc disease, facet disease and spine disease. Dr. McFadden answered he had "done hundreds of hours of research on [his] own time, of [his] own choosing, and spent many thousands of dollars of [his] own money." To this answer, Dr. Riley responded "[m]eaningless."

¶ 59. Dr. McFadden also contends Dr. Riley stated that Dr. McFadden was "being cruel" to his patients and stated that Dr. McFadden's testimony "will never convince me." Dr. Riley's comment about Dr. McFadden "being cruel" to

his patients was in reference to patients whom Dr. McFadden had diagnosed as being suicidal, yet he failed to record this information in the patients' medical records or refer them to a psychiatric specialist. Dr. Riley noted that it would be "cruel" to these patients to "give them all the narcotics they want. They may be suicidal, and you give them narcotics, and narcotics cause personality changes." Furthermore, Dr. Riley's comment "you'll never convince me" was made in the context of an exchange between Dr. Riley and Dr. McFadden concerning the subject of alcoholism. Dr. Riley concluded the discussion by stating "I'll never convince you and you'll never convince me." Read in context, these comments do not demonstrate bias or impartiality; and therefore, this argument is without merit.

¶ 60. Dr. McFadden also contends that his witness Priscilla Lovelace, whom he characterizes as a "mentally slow charity patient," was "attacked with vengeance" by the Board. At the hearing, Dr. Freda Bush asked Ms. Lovelace several questions, including whether Ms. Lovelace was compensating Dr. McFadden for his services.[5] A review of the record reveals Dr. Bush was merely trying to clarify a confusing area of Ms. Lovelace's testimony.

¶ 61. Dr. McFadden also refers to the Board's more recent investigation of him, involving events subsequent to the disciplinary action at issue. Dr. McFadden claims this conduct constitutes "a pattern and practice of harassment

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5. The actual question by Dr. Bush was "[s]o you've been seeing him for a year, and you've paid him nothing? Okay. I'm not trying to embarrass you. It's just that you said that you pay him something."

and intimidation practiced by this Board to do harm to Dr. McFadden." Dr. McFadden's reference to this more recent investigation is not relevant to the issues presently before this Court. See Turner v. Nicolson, 151 Miss. 325, 117 So. 329, 331 (1928) (holding the appellate court could only consider the trial court record and any rights arising out of facts or matters occurring since trial below must be presented to the trial court); Terry v. Superintendent of Ed., 211 Miss. 462, 52 So.2d 13, 14 (1951) (stating appellate courts "review only such matters as were considered by the lower court").

¶ 62. Dr. McFadden also argues that the affidavit filed by Mr. Washington was "riddled with errors." First, Dr. McFadden complains Counts I, VI and IX asserted against him in the affidavit alleged violations of a non-existent statute. While the initial draft of the affidavit contained a typographical error in these three counts (i.e., it cited Section 73-25-13 rather than 73-25- 29 of the Code), this error was later corrected by the Board's counsel. Dr. McFadden also asserts that the patients' average daily consumption quantities calculated by investigators for controlled substance prescriptions issued by Dr. McFadden were "manifestly wrong." Specifically, Dr. McFadden alleges that in calculating the average daily consumption for each of the four patients at issue, the overall time period in which the drugs were consumed should be enlarged by the number of days allowed by the last prescription Dr. McFadden issued to each patient during the profile period. Mr. Washington testified that because the average daily consumption figures he calculated do not include the final prescription Dr. McFadden issued during the period of time

in question, the calculation does not take into account the time Dr. McFadden may have allotted for the patient to take the final prescription. The Board explains that the final prescription for each patient within the profile period was not included in the average daily consumption figures because the investigators had no way of knowing how quickly the patient would have consumed the last prescription, i.e., the investigators did not know if or when the patient would have sought his next refill because of the limited scope of the prescription profile.

¶ 63. Dr. McFadden also suggests that because there were no opening arguments in this case this somehow contributed to the alleged denial of his due process rights. First, it should be noted Dr. McFadden made no contemporaneous objection to the Board's decision to waive opening statements. Second, opening statements are often waived in cases where there is already a general understanding of the issues to be addressed. Therefore, we conclude this argument is without merit.

¶ 64. Finally, Dr. McFadden characterizes this case as "a disagreement among two groups of professionals about the appropriate course of treatment" for chronic non-malignant pain patients instead of a disciplinary action for improper patient monitoring and improper controlled substance prescribing practices. Dr. McFadden states that as a result of his "difference of opinion" as to the proper course of treatment for "chronic pain" patients, he "was severely punished."

¶ 65. Dr. McFadden's argument is supplemented by an amicus curiae brief which discusses governmental

regulation over physicians' treatment of "chronic non-malignant pain" patients. In its amicus curiae brief, the American Pain Society and the American Academy of Pain Medicine advocate public policy arguments relative to the physicians' use of controlled substances: (1) chronic pain is a serious medical condition, (2) long-term opioid treatment for chronic pain is medically accepted, and (3) the long-term sanctioning of a physician for prescribing opioid treatment for chronic pain absent a clear showing that the physician acted outside the course of professional practice will deter other physicians.

¶ 66. A Louisiana court recently rejected a "difference of professional opinion" argument similar to the one asserted by Dr. McFadden in this case. Holladay v. Louisiana State Bd. of Med. Examiners, 689 So.2d 718, 725-26 (La.Ct.App.1997) (sanctioning the defendant physician for failure to monitor patients and failure to examine patients before prescribing narcotics to them). The physician argued that "a conflict exists between two divergent schools of thought, one more liberal than the other, as to the appropriate manner of prescribing controlled substances in the treatment of chronic non-malignant pain," and that "because of this conflict and in absence of any governing written standards, the Board cannot find [the physician] in violation of [the applicable rules]." Id. at 726. The Louisiana court held that "[the physician's] argument misses the point. It is not [the physician's] liberal prescribing philosophy which resulted in the Board's decision, rather it was [the physician's] failure to adhere to basic precepts of medical practice or to follow the appropriate medical standards that were his violations.

Certain basic standards are recognized by both schools of thought." Id. Similarly, this Court concludes that Dr. McFadden misses the point. It was Dr. McFadden's failure to record the issuance of numerous controlled substance prescriptions, among other things, in violation of the Board's rules and regulations that resulted in this disciplinary proceeding.

CONCLUSION

¶ 67. Mississippi law mandates that when a physician prescribes controlled substances, he or she must maintain accurate records of such prescriptions for each patient treated. Dr. McFadden failed to maintain such records not only in violation of Mississippi law but also in contravention of prudent medical practice.

¶ 68. The record substantially supports the Board's findings of fact, and consequently, the Board's decision to place restrictions on Dr. McFadden's ability to practice medicine in this State was not arbitrary or capricious. Also, a fair reading of the record reveals that Dr. McFadden was not denied his right to due process of law and that he received a fair and impartial hearing. Accordingly, the judgment of the Hinds County Chancery Court is

¶ 69. AFFIRMED.

PITTMAN, P.J., BANKS, McRAE, JAMES L. ROBERTS, Jr., SMITH and WALLER, JJ., CONCUR.

PRATHER, C.J., and MILLS, J., NOT PARTICIPATING.

APPENDIX B — JUDGMENT OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI DATED AND FILED OCTOBER 14, 1997

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

CASE NO. G96-2601 O/3

JOHN WILBUR McFADDEN, JR., M.D.

APPELLANT

v.

MISSISSIPPI STATE BOARD OF
MEDICAL LICENSURE

APPELLEE

JUDGMENT

THIS MATTER having come before this Court on appeal by John Wilbur McFadden, Jr., M.D., from a written Determination and Order rendered by the Mississippi State Board of Medical Licensure ("the Board"), on November 22, 1996, suspending Dr. McFadden's medical license, subject to a conditional stay, and having considered all testimony and arguments of counsel, this Court rendered its Opinion on October 8, 1997, as filed herein. In conformity with said Opinion and in compliance with Miss. R. Civ. P. 58 and Miss. Unif. Chan. Ct. R. 5, this Court now enters its Judgment implementing said Opinion.

Appendix B

NOW THEREFORE, the written Determination and Order rendered November 22, 1996, by the Board against John Wilbur McFadden, Jr., M.D., Appellant, is hereby as a matter of law, AFFIRMED.

SO ORDERED, this the 14th day of October, 1997.

s/ Denise S. Owens
DENISE S. OWENS
CHANCELLOR

AGREED AS TO FORM:

s/ Stan T. Ingram
STAN T. INGRAM
HEIDELBERG & WOODLIFF, P.A.
ATTORNEY FOR APPELLEE

s/ Alex Alston
ALEX ALSTON
ALSTON, RUTHERFORD & VAN SLYKE
ATTORNEY FOR APPELLANT

APPENDIX C — OPINION OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI DATED AND FILED OCTOBER 8, 1997

IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

G-96-2601 O/3

JOHN WILBUR McFADDEN, JR., M.D.

APPELLANT

v.

MISSISSIPPI STATE BOARD OF
MEDICAL LICENSURE

APPELLEE

OPINION

John Wilbur McFadden, Jr., M.D., appeals the written determination and order of appellee, Mississippi State Board of Medical Licensure ("the Board"), dated November 22, 1996, suspending his medical license, subject to a conditional stay. Subject-matter jurisdiction of this appeal is properly in this court. Mississippi Code Annotated §73-25-27 (1972); Mississippi Code Annotated §73-25-95 (1972).

Appendix C

The appeal is submitted, without oral argument, for consideration upon the administrative record filed April 15, 1997,[1] appellant's unfiled supporting brief, the Board's opposing brief filed June 4, 1997, and appellant's unfiled reply brief. Appellant contends the Board's order violates his due-process right, is unsupported by credible substantial evidence, and is arbitrary and capricious. For the reasons stated herein, this court affirms the Board's order.

The Board's order

Pursuant to summons dated June 12, 1996, the Board noticed appellant of eleven charges against him concerning his prescribing activity from January 1, 1995, through January 31, 1996, for four patients, as follows:

> (1) As to patients Dwight Kee, Jeffrey Gilmore, and Jackie Tate, one count each for violating Mississippi Code Annotated §73-25-29(13) (1972)[2] and the Board's Rules and Regulations

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1. See separate order entered October 6, 1997, regarding appellee's motion, filed June 19, 1997, for clarification and/or correction of the record.

2. Section 73-25-29(13) provides

> The grounds for the nonissuance, suspension, revocation or restriction of a license or the denial of reinstatement or renewal of a license are: . . . (13) Violation of any provision(s) of the Medical Practice Act or the rules and regulations of the board or of any order, stipulation or agreement with the board.

(Cont'd)

Appendix C

"Pertaining to Prescribing, Administration and Dispensing of Medication" ("Rules"), section IV.E.,[3] for failure to maintain a complete record of the examination, evaluation, and treatment of the patient, including documentation of the diagnosis and reason for prescribing controlled substances,

(2) As to Mr. Kee, patient Priscilla Lovelace, Mr. Gilmore, and Mr. Tate, one count each for

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(Cont'd)
As reflected in the Board's order, section 73-25-29(13) was redesignated section 73-25-29(1)(m) from July 1, 1996 through June 30, 1997. 1996 Laws, ch. 507, §57; 1997 Laws, ch. 564, §1.

3. Rule IV.E. provides

> A physician who prescribes, dispenses or administers a controlled substance shall maintain a complete record of his examination, evaluation and treatment of the patient which must include documentation of the diagnosis and reason for prescribing, dispensing or administering any controlled substance; the name, dose, strength, quantity of the controlled substance and the date that the controlled substance was prescribed, dispensed or administered. The record required by this subsection shall be maintained in the patient's medical records, provided that such medical records are maintained at the office of the physician and are available for inspection by the representative of the Mississippi State Board of Medical Licensure pursuant to authority granted in Miss. Code Ann. §41-29-125 (Supp. 1986).

violating section 73-25-29(13) and Rules Section IV.F.,[4] as a result of prescribing controlled substances or other drugs having addiction-forming or addiction-sustaining liability without a good faith examination or medical indication thereof, and

(3) As to Mr. Kee, Ms. Lovelace, Mr. Gilmore, and Mr. Tate, one count each for violating

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4. Rule IV.F. provides: "No physician shall prescribe, administer or dispense any controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith prior examination and medical indication therefore."

The footnoted comment to Rule IV.F. provides, in pertinent part:

> A determination as to whether a "good faith prior examination and medical indication therefore" exists depends upon the facts and circumstances in each case. . . . Standards of proper medical practice require that, upon any encounter with a patient, in order to establish proper diagnosis and regimen of treatment, a physician must take three steps: (a) take and record an appropriate medical history, (b) carry out an appropriate physical examination, and (c) record the results. The observance of these principles as a function of the "course of legitimate professional practice" is particularly of importance in cases in which controlled substances are to play a part in the course of treatment. . . . A determination of proper "medical indication" also requires a careful examination of the nature of the drug and all circumstances surrounding dispensation.

sections 73-25-29(3)[5] and (8)(d),[6] and Mississippi Code Annotated §73-25-83(a) (1972)[7] for prescribing drugs having addiction-

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5. Section 73-25-39(3) provides: "The grounds for the nonissuance, suspension, revocation or restriction of a license or the denial of reinstatement or renewal of a license are: . . . (3) Administering, dispensing or prescribing any narcotic drug, or any other drug having addiction-forming or addiction-sustaining liability otherwise than in the course of legitimate professional practice." As reflected in the Board's order, section 73-25-29(3) was redesignated section 73-25-29(1)(c) from July 1, 1996 through June 30, 1997. 1996 Acts, ch. 507, §57; 1997 Acts, ch. 564, §1:

6. Section 73-25-29(8)(d) provides "The grounds for the nonissuance, suspension, revocation or restriction of a license or the denial of reinstatement or renewal of a license are: . . . (8) Unprofessional conduct, which includes, but is not limited to: . . . (d) Being guilty of any dishonorable or unethical conduct likely to deceive, defraud or harm the public." As reflected in the Board's order, section 73-25-29 (8)(d) was redesignated section 73-25-29(1)(h)(iv) from July 1, 1996, through June 30, 1997. 1996 Acts, ch. 507, §57; 1997 Acts, ch. 564, §1.

7. Section 73-25-83(a) provides:

> The board shall have authority to deny an application for licensure or other authorization to practice medicine in this state and to discipline a physician licensed or otherwise lawfully practicing within this state who, after a hearing, has been adjudged by the board as unqualified due to one or more of the following reasons: (a) Unprofessional conduct as defined in the physician licensure and disciplinary laws, pursuant to Section 73-25-29.

> forming or addiction-sustaining liability otherwise than in the course of legitimate professional practice, and for unprofessional conduct, including dishonorable or unethical conduct likely to deceive, defraud or harm the public,

being grounds for probation, suspension or revocation of appellant's Mississippi medical license. After an evidentiary hearing, the Board unanimously found appellant guilty on each count. For these violations, the Board suspended appellant's medical license indefinitely, subject to an automatic stay conditioned on numerous probationary terms that severely restrict, or, in some circumstances, prohibit his privileges to prescribe controlled substances. The Board's order provides appellant with the right to petition for release of any or all of the probationary conditions after expiration of five years from the order's effective date, November 22, 1996.

Standard of review

The standard governing judicial review of administrative-agency decisions is established and is the same for trial and appellate courts, as follows:

> This Court does not review administrative agency decisions *de novo*; rather, it looks to see if the decision was supported by substantial evidence, or if it was arbitrary and capricious, beyond the power of the agency, or in violation of some constitutional or statutory right of the

> complaining party. There is a rebuttable presumption in favor of the agency decision and the burden of proof is on the party challenging that decision.

Montalvo v. Mississippi State Board of Medical Licensure, 671 So.2d 53, 55-56 (1996) (citation omitted); *Mississippi State Board of Public Accountancy Acting as Board and Trial Board v. Gray*, 674 So.2d 1251 (Miss. 1996) (stating trial courts are held to the same standard when reviewing agency decisions). The reviewing court gives "great deference to the decisions of administrative agencies, believing that they know best how to police their own, especially when the board sitting in judgment is comprised of fellow practitioners." *Mississippi Board of Nursing v. Hanson*, No. 95-CC-00542-SCT, 1997 WL575986, at *4 (Miss. Sept. 18, 1997).

Due process

Appellant argues he was denied a fair and impartial hearing before a neutral tribunal in violation of his constitutional right to due process of law. More specifically, appellant argues (1) the Board impermissibly acted as his investigator, prosecutor and judge, (2) the Board members were biased against him and the practice of pain management through administration of opioids[8] or other

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8. The *Compact Oxford English Dictionary* (2d ed. 1991) defines "opioid" to mean "opiate." *Black's Law Dictionary* (6th ed. 1990) at 1092, defines "opiate" to mean "any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability."

analgesic medications, as evidenced by their hostile cross-examination of him and his witnesses, and (3) the comments and opinions voiced by the Board members at the evidentiary hearing constituted impermissible unsworn testimony not subject to cross-examination. The Board responds appellant should not be permitted to raise his due-process argument for the first time on appeal, or, in the alternative, that the due-process argument is without merit. In reply, appellant does not dispute his failure to contemporaneously object to the Board's conduct at the hearing, but asserts "[n]o law, rule or regulation requires objections to hostile comments and questions or statement of opinion offered by the Board," appellant's reply brief at 11, or, in the alternative, that the Board's conduct constitutes plain error, making no objection necessary.

As a general rule, an appellant cannot raise matters at the appeal level that were not objected to during the administrative hearing. *Mississippi Board of Nursing v. Belk*, 481 So.2d 826, 829 (Miss. 1985) (quoting *Unemployment Compensation Commission of Territory of Alaska v. Aragan*, 329 U.S. 143 (1946): "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not therefore presented and deprives the commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action."). Nonetheless, in Mississippi, the Mississippi Supreme Court has held it retains inherent discretionary authority to disregard that rule and notice plain errors affecting substantial rights or in order to prevent a manifest miscarriage of justice. *Marion City Board of Supervisors v. Pennington*, 673 So.2d 748 (Miss. 1996). This court

presumes it may exercise the same discretion in its review of the Board's decision. *Cf.* Mississippi Rule of Evidence 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").

Plain-error analysis is conducted without hard and fast rules on a case-by-case basis upon consideration of such factors as the obviousness of the error, the strength of the case against the defendant, and whether a timely objection would have cured the error or enabled the trier-of-fact to prevent injustice. 5 AM. JUR. 2D *Appellate Review* §773-74 (CD-ROM LawDesk, June 1997). In the federal context, plain error has been described as a "rare species" in civil cases. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE §5043 (1997 Supp.).

In the present case, appellant's plain-error analysis consists of a citation to *United States v. Woods*, 252 F.2d 334 (2d Cir. 1958), and the conclusory statement that the Board's conduct constituted plain error. In *Woods*, which was an appeal from a conviction for selling narcotics in violation of a federal statute, the reviewing court cited Federal Rule of Criminal Procedure 52(b),[9] and, despite the defendant's failure to object at trial, reviewed the error that occurred when the trial judge told the jury he personally believed the defendant was guilty. Based on its distinctively different facts, this court does not find *Woods* is not

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9. Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

persuasive authority for appellant's plain-error argument. Moreover, based upon this court's review of the entire record, it is not persuaded appellant has demonstrated plain error occurred.

In considering whether the Board's combination of investigative, prosecutorial and adjudicatory functions constitutes plain error, this court observes it has been held such combinations in other agencies does not necessarily constitute a due-process violation. *E.g., Withrow v. Larkin*, 421 U.S. 35, 58 (1975) ("[T]he combination of investigative and adjudicative functions does not, without more, constitute a due process violation[.]"); *McGowan v. Mississippi State Oil & Gas Board*, 604 So.2d 312 (Miss. 1992), *cert. denied* 506 U.S. 1052 (1993) (vacating and remanding on other grounds). On the facts of the present case, and in the absence of clear authority to the contrary, this court is not persuaded the Board's combination of investigative, prosecutorial, and adjudicatory functions constitutes plain error.

In considering whether the Board members' allegedly biased questions to appellant and his witnesses at the hearing constitutes plain error, this court is mindful:

> [T]here is a presumption that the officers conducting the hearing and the members of the Board behave honestly and fairly in the conduct of the hearings and in the decision-making process. Absent some showing of personal or financial interest on the part of the hearing officer or evidence of misconduct on the officer's part, this presumption is not overcome.

Hanson, No. 95-CC-00542-SCT, 1997 WL575986, at *7 (Miss. Sept. 18, 1997) (quoting *United Cement Company v. Safe Air for the Environment, Inc.*, 558 So.2d 840, 842-43 (Miss. 1990) (citation omitted)). Appellant does not dispute the fact that a board member may question witnesses "to bring out important matters, clear up apparent confusion or provide full explanation of the testimony." Appellant's reply brief at 6. *Cf.* Mississippi Rule of Evidence 614(b) (authorizing the court to interrogate witnesses). Nonetheless, with numerous citations to the hearing transcript, appellant contends "this Board was out to crucify [him], regardless of the evidence." Appellant's brief at 28. Upon its review of the entire record, however, this court is not persuaded by appellant's characterization of the Board's conduct, and, in the absence of any other suggested foundation for financial or personal interest in or prejudgment of this case by the Board members, concludes appellant has not rebutted the aforementioned presumption of fairness, or demonstrated plain error by reason of the Board members' questions at the hearing.

Appellant devotes primary discussion to *Jones v. State Department of Public Health and Welfare*, 354 S.W.2d 37 (Mo. Ct. App. 1962), in support of its contention, with numerous citations to the hearing transcript, that the Board members' statements constituted impermissible unsworn testimony. In *Jones*, the Missouri appellate court affirmed a trial-court order setting aside the agency's decision. In *Jones*, the Missouri appellate court concluded the appellant had been denied a fair administrative hearing because the hearing record, which was certified to the agency director to make the agency decision, contained (over the claimant's

contemporaneous objection) unauthorized opinions on the merits of the controversy and evidence amounting to unsworn testimony from the appointed attorney-referee who had conducted and prosecuted the administrative hearing. The Missouri appellate court stated:

> Whether or not the director was influenced in his decision by the referee's views of the case, we are unable to say — any more than we could say, with informed certainty, whether like indiscretions on the part of a trial judge in a jury case had any effect on the jury's verdict. *It is sufficient to note that the prejudicial remarks and expressed views of the referee could have been a factor in the turn of the decision against claimant.*

Id. at 41. [Emphasis added.] This court does not find *Jones* persuasive authority for appellant's plain-error argument. In *Jones*, plain error was not an issue. Moreover, even assuming, arguendo, the Board members' statements during the hearing "could have been a factor in the turn of [their] decision against [appellant]," *id.*, this court must proceed to weigh that assumption, for purposes of plain-error analysis, against such factors as the obviousness of the error, the strength of the case against appellant, and whether timely objection would have cured the error or enabled the Board to prevent injustice. In the absence of clear authority to the contrary, this court is not persuaded plain error occurred by reason of the Board members' comments at the hearing, or that such comments rose to the level of unsworn testimony subject to appellant's right of cross-examination.

Cf. Reynolds v. Louisiana State Board of Medical Examiners, 646 So.2d 1244 (La. Ct. App. 1994) (holding due process did not require the appellee's members to submit to cross-examination by the physician they were investigating).

Sufficiency of evidence

In considering whether the agency's findings are supported by substantial evidence, the reviewing court "looks to see whether a fair-minded fact finder might have found the evidence clear and convincing that the offense had occurred[.]" *Riddle v. Mississippi State Board of Pharmacy*, 592 So.2d 37, 41 (Miss. 1991). This standard does not entitle the reviewing court to reweigh the facts or to substitute its judgment for that of the agency. *Hanson*, No. 95-CC-00542-SCT, 1997 WL575986 (Miss. Sept. 18, 1997).

The charges against appellant were set forth in a two-page summons, exhibiting the twenty-five page affidavit of the Board's investigator, Thomas Washington, summarizing the results of his investigation into appellant's prescribing activities. At the evidentiary hearing on the charges, which was conducted on November 21 and 22, 1996, the Board called two witnesses: Mr. Washington and Dr. Bernard Patrick, a board-certified neurological surgeon who was admitted, without objection, as "an expert." Record, Volume I at 96. Appellant then testified in his own behalf and called six witnesses: Dr. David McKeller, who was admitted without objection as an expert in pain medicine, Dr. George McGee, Dr. Daniel Brookhoff, who

was admitted without objection as an expert in pain management, Ms. Lovelace, Mr. Tate, and Mr. Kee. The parties introduced a total of twenty exhibits, and were represented by counsel throughout the proceedings. The evidence was undisputed that the four subject patients suffer from intractable, noncancer pain.

Mr. Washington, the Board's first witness, testified as to his investigative findings set forth in his aforementioned affidavit, which was introduced into evidence. Mr. Washington testified his findings were based on his review, assisted by Dr. Tom Stevens, the Board's medical consultant and Dr. Patrick, of appellant's medical files for the four subject patients, and interviews with pharmacists to verify appellant's authorization of prescriptions. Mr. Washington testified he had been employed by the Board for six years. Mr. Washington's investigative findings included, but were not limited to, the following:

> *Mr. Kee.* During the period between February 25, 1995, and January 2, 1996, appellant issued Mr. Kee fifty-six controlled-substance prescriptions totaling approximately 2,998 dose units including refills (9.64 average daily dose), and administered six controlled-substance injections. On twenty-one occasions, prescriptions were issued at a time when Mr. Kee should not have been finished taking the same or similar medication from a prior prescription had the prescription directions been followed or the correct dosage taken; on fifteen occasions, appellant failed to enter into the file a complete

record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof; on eight occasions, appellant issued a prescription for a controlled substance with no corresponding entry in Mr. Kee's medical file. The medical file included three entries containing indicators or "red flags" suggesting possible drug abuse by Mr. Kee, and, based thereon, appellant knew or should have known Mr. Kee was having a problem with controlled substances. Mr. Kee was started on a regimen of controlled substances without a prior determination that non-addictive substances were ineffective. The controlled substances prescribed are drugs having addiction-forming and addiction-sustaining liability.

Ms. Lovelace. During the period between January 3, 1995, and January 29, 1996, appellant issued Ms. Lovelace sixteen controlled-substance prescriptions totaling approximately 2,700 dose units including refills (6.91 average daily dose). On nine occasions, appellant failed to fully document and enter a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof. The medical file included four entries containing indicators or "red flags"

suggesting possible drug abuse by Ms. Lovelace, and, based thereon, appellant knew or should have known Ms. Lovelace was having a problem with controlled substances. Ms. Lovelace was started on a regimen of controlled substances without a prior determination that non-addictive substances were ineffective. The controlled substances prescribed are drugs having addiction-forming and addiction-sustaining liability.

Mr. Gilmore. During the period between January 12, 1995, and January 12, 1996, appellant issued Mr. Gilmore eighteen controlled-substance prescriptions totaling approximately 2,250 dose units including refills (6.16 average daily dose). On nine occasions, appellant failed to enter into the file a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof; on four occasions, appellant issued a prescription for a controlled substance with no corresponding entry in Mr. Gilmore's medical file. The medical file included two entries containing indicators or "red flags" suggesting possible drug abuse by Mr. Gilmore, and, based thereon, appellant knew or should have known Mr. Gilmore was having a problem with controlled substances. Mr. Gilmore was started on a regimen of controlled substances

without a prior determination that non-addictive substances were ineffective. The controlled substances prescribed are drugs having addiction-forming and addiction-sustaining liability.

Mr. Tate. During the period between January 4, 1995, and January 16, 1996, appellant issued Mr. Tate thirty-one controlled-substance prescriptions totaling approximately 3,036 dose units including refills (8.05 average daily dose). On nineteen occasions, prescriptions were issued at a time when Mr. Tate should not have been finished taking the same or similar medication from a prior prescription had the prescription directions been followed or the correct dosage taken; on ten occasions, appellant failed to enter into the file a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof; on eight occasions, appellant issued a prescription for a controlled substance with no corresponding entry in Mr. Tate's medical file. The medical file contained four entries containing indicators or "red flags" suggesting possible drug abuse by Mr. Tate and, based thereon, appellant knew or should have known Mr. Tate was having a problem with controlled substances. The controlled substances prescribed are drugs having addiction-forming and addiction-sustaining liability.

Appendix C

Mr. Washington's affidavit identifies the prescriptions by date, prescription number, drug, and quantity (including refills).

Dr. Bernard Patrick, the Board's second witness, testified he had reviewed and analyzed appellant's four subject medical files, which were introduced into evidence. On direct examination, Dr. Patrick opined, without objection, that, based upon his experience and training and his review of the four subject medical files: (1) appellant had prescribed controlled substances or other drugs having addiction-forming or addiction-sustaining liability outside the course of professional practice, (2) appellant had prescribed drugs having addiction-forming or addiction-sustaining liability to the four subject patients without proper medical indication, and (3) appellant prescribing other controlled substances to the four subject patients would constitute unprofessional conduct likely to harm the public, including the patient.

This court summarizes appellant's multiple arguments for reversal on this point as raising issues regarding the accuracy of Mr. Washington's affidavit, particularly the mathematical computations of per diem average dose unit prescribed, the relative credibility and weight to be accorded each party's witnesses, particularly the expert witnesses, and conflicting testimonies. Such issues of fact and credibility are the primary responsibility of the trier-of-fact. On appeal, this court neither reweighs the facts nor substitutes its judgment for that of the fact-finder as to credibility issues. Said another way, this court's substantial-evidence review" is concerned only with the

reasonableness of the administrative order, not its correctness." *Mississippi Department of Environmental Quality v. Weems*, 653 So.2d 266, 281 (Miss. 1995) (quoting 2 AM.JUR. *2D ADMINISTRATIVE LAW* §541). With regard for our settled scope of review, this court concludes the record before it contains evidence that a fair-minded fact finder might have found clear and convincing proof the charged offenses had occurred.

Arbitrary or capricious action

In considering whether an agency acted arbitrarily and capriciously, "[t]he reviewing court is charged to study the record and the legislative facts to which the challenged order points and divine a rational basis upon which the administrator may have acted." *McGowan*, 604 So.2d at 322. This standard requires "administrators say at least minimally why they do what they do so someone can see whether it be arbitrary or capricious." *Id.* In the present case, this standard is met. The Board's thirty-page order contains detailed findings of fact, incorporating, but not limited to, lengthy portions of Mr. Washington's investigative findings, and conclusions of law as to the eleven offenses.

Conclusion

For the reasons stated above, this court affirms the Board's order. The Board's counsel is directed to prepare a final Judgment in conformity with this opinion and in accordance with Mississippi Rule of Civil Procedure 58 and Uniform Chancery Court Rule 5.

Appendix C

IT IS SO ORDERED AND ADJUDGED, this the 8th day of October, 1997.

s/ Denise S. Owens
DENISE S. OWENS, CHANCELLOR

APPENDIX D — DETERMINATION AND ORDER OF THE MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE DATED NOVEMBER 22, 1996

BEFORE THE MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE

IN THE MATTER OF THE PHYSICIAN'S LICENSE

OF

JOHN WILBUR McFADDEN, JR., M.D.

DETERMINATION AND ORDER

THIS MATTER came on regularly for hearing on November 21, 1996, before the Mississippi State Board of Medical Licensure, pursuant to Miss. Code Ann. Section 73-25-27 (1972) as amended. The Board initiated these proceedings on June 12, 1996, by issuance of a Summons against John Wilbur McFadden, Jr., M.D. (hereinafter "Licensee"), charging Licensee with violation of Section 73-25-83(a) and Subsections (3), (8)(d) and (13) of Miss. Code Ann. Section 73-25-29 (1972), codified effective July 1, 1996, as Subsections (1)(c), (1)(h)(iv) and (1)(m) of Section 73-25-29. The specific allegations were set forth by Affidavit of Thomas E. Washington, Investigator, dated June 12, 1996, attached to and made a part of the Summons, wherein Licensee was charged with eleven (11) separate counts of violation of the Mississippi Medical Practice Act, including administering, dispensing or prescribing narcotic drugs or other drugs having addiction-forming or addiction-sustaining liability otherwise than in the course of legitimate professional practice; unprofessional conduct

which includes being guilty of dishonorable or unethical conduct likely to harm the public; and violation of the rules and regulations of the Board pertaining to "Prescribing, Administering, and Dispensing of Medication."

This matter was originally set for hearing on July 18, 1996. Pursuant to petitions duly presented, Licenses was granted a continuance until today's date.

The hearing was convened at 11:00 a.m., Licensee appearing in person, represented by Hon. Alex A. Alston, Jr., Jackson, Mississippi. Complaint Counsel for the Board was Hon. Stan T. Ingram. Sitting as legal advisor for the Board was Hon. Van Gillespie, Special Assistant Attorney General. Evidence and testimony were then presented. Based upon the above, the Board renders the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1.

John Wilbur McFadden, Jr., M.D., hereinafter referred to as "Licensee", is a physician licensed to practice medicine in the State of Mississippi, currently holding License No. 05129.

2.

On or about April 9, 1992, investigators of the Mississippi State Board of Medical Licensure visited Licensee's clinic in Tupelo, Mississippi, to perform a review

of selected patient charts, identified through prescription profile efforts as receiving unusual quantities of controlled substance prescriptions from Licensee. Seven (7) patient medical files were reviewed and discussed with Licensee and all were identified as having some type of problem with drug use/abuse. Many of the prescriptions issued to said patients were not properly documented in the charts. Investigators also discussed the results of an accountability, audit and compliance inspection, as a follow-up to a prior audit and inspection performed by the Board and the U.S. Drug Enforcement Administration in 1988. As a result of this visit, Frank J. Morgan, Jr., M.D., then Executive Officer of the Board, corresponded with Licensee, confirming the visit by the investigators and providing certain recommendations relative to the prescribing of controlled substances. The specific recommendations of Dr. Morgan were as follows:

> "Also discussed with you were prescription profiles and dispensing records indicating several of your patients have been receiving large quantities of controlled substances over a long period of time. You are strongly encouraged to document a diagnosis which is supported by history and physical findings and by the results of any appropriate tests. Before beginning a regimen of controlled drugs, you may want to make a determination through trial or through a documented history that non-addictive modalities are not appropriate. Appropriate specialists, such as neurologists, orthopedists, or psychiatrists, should be consulted for specific

tests or evaluations, if indicated. The results of these referrals and evaluations or tests should be included in the patient's chart.

You should make certain that you are in control of the supply of drugs to your patients and that you are not dealing with a "drug seeking" patient. You are expected to maintain regular monitoring of the patient. Under certain conditions "drug holidays" are appropriate. This allows you to evaluate the original symptoms.

The objective of this Board is to improve the quality of medical care and to insure that all licensees practice medicine with reasonable skill and safety to patients. This Board does not have a magic formula for determining the doses and duration of the administration for any drug. The Board does expect physicians to create a record that shows the proper indication for the use of a drug or other therapy, monitoring of the patient where necessary, the patient's response to therapy on follow-up visits and all rationale for continuing or modifying the therapy.

You should be aware that post-dating controlled substance prescriptions is prohibited by federal law. Any prescription you issue should be dated and signed on the date of issuance.

Neither this Board nor the Federal Drug Enforcement Administration will tolerate

excessive prescribing or dispensing in the absence of legitimate medical need or the maintenance of addiction in patients. Should any violation in any area of state or federal law be identified in the future, possible disciplinary action will be considered. I cannot emphasize to you the importance of being in compliance with every regulation regarding the practice of medicine and in the dispensation and handling of controlled substances."

Following additional prescription profile efforts during January and February, 1996, 36 patient charts were obtained from Licensee's clinic for analysis by investigators of the Mississippi State Board of Medical Licensure. Of the medical files seized, four (4) were chosen for the purpose of this hearing, i.e., the medical files of Dwight Kee, Pricilla Lovelace, Jeffrey Gilmore and Jackie Tate.

3.

Contact with the United States Drug Enforcement Administration in New Orleans, Louisiana, in March, 1996, indicated that Licensee is currently registered to administer, dispense and prescribe controlled substances in Schedules II, IIN, III, IIIN, IV, and V pursuant to Uniform Controlled Substance Registration Certificate No. AM9471210.

4.

Between February 25, 1995, and January 2, 1996, Licensee did issue to Patient Dwight Kee, fifty-six (56)

prescriptions for controlled substances totalling approximately 2,998 dose units (9.64 per day) including refills. Among these prescriptions were eleven (11) prescriptions for 264 MS Contin 15mg; one (1) prescription for 30 MS Contin; eight (8) prescriptions for 139 Percocet; thirteen (13) prescriptions for 880 Vicodin; four (4) prescriptions for 220 Hydrocodone 5mg; eleven (11) prescriptions for 830 Vicodin ES; two (2) prescriptions for 280 Hydrocodone 7.5mg; one (1) prescription for 100 Tylenol #3; one (1) prescription for 15 Tylox; one (1) prescription for 30 Tranxene 7.5mg; one (1) prescription for 60 Ambien 5mg; and two (2) prescriptions for 150 Ambien 10mg. Said prescriptions are summarized as follows:

Date	Script #	Drug	Qty
01/02/96	436321	Hydrocodone 7.5mg	60x2
12/29/95	652161	Vicodin ES	10
11/27/95	434907	Vicodin ES	60x2
11/20/95	761291	Vicodin	60
10/27/95	433843	Vicodin ES	50x2
10/20/95	Pt File	Vicodin	50
10/16/95	647340	MS Contin 15mg	15
10/16/95	647341	Vicodin ES	30
10/09/95	433147	Tranxene 7.5mg	30
10/09/95	433146	Vicodin ES	50x1
10/03/95	432892	Vicodin ES	10
10/03/95	432893	MS Contin 15mg	30
10/02/95	Pt File	MS Contin	30
09/25/95	432579	Vicodin ES	40
09/22/95	432521	MS Contin 15mg	30

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09/14/95	432218	Vicodin	40
09/07/95	432039	Ambien 10mg	30x2
09/07/95	432038	Vicodin ES	40
09/07/95	431968	MS Contin 15mg	30
08/29/95	644448	MS Contin 15mg	30
08/23/95	431471	MS Contin 15mg	20
08/18/95	431348	Vicodin	60x1
08/14/95	148502	Vicodin ES	50
08/14/95	431146	MS Contin 15mg	25
08/06/95	430895	MS Contin 15mg	30
08/01/95	430753	Vicodin ES	60x1
07/25/95	147274	Hydrocodone 5mg	60
07/22/95	430438	MS Contin 15mg	24
07/17/95	430234	MS Contin 15mg	14
07/10/95	430055	MS Contin 15mg	16
07/07/95	146155	Vicodin ES	50x1
07/07/95	146154	Percocet	30
06/30/95	145758	Percocet	10
06/30/95	145759	Vicodin	50
06/30/95	145760	Ambien 10mg	20x2
06/26/95	429623	Vicodin	20
06/22/95	510969	Percocet	15
06/19/95	429430	Vicodin	60x1
06/12/95	Pt File	Vicodin	60
05/30/95	429194	Vicodin	60
05/29/95	428784	Percocet	12
05/25/95	428719	Percocet	12
05/25/95	428718	Ambien 5mg	30x1
05/25/95	428717	Vicodin	60x2
05/15/95	428295	Vicodin	60
05/12/95	428251	Percocet	30
05/08/95	428089	Vicodin	60

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04/29/95	497683	Percocet	15
04/25/95	427598	Vicodin	60
04/24/95	496549	Percocet	15
04/18/95	427305	Tylox	15
04/15/95	427226	Hydrocodone 5mg	50
04/07/95	426994	Hydrocodone 5mg	50
03/30/95	426644	Hydrocodone 5mg	50
03/13/95	426075	Vicodin	50
02/24/95	4409338	Tylenol #3	50x1
02/24/95	4409349	Vicodin	30x1

During this profile period, Licensee did also administer to Patient Kee the following injections of controlled substances:

Date	Script #	Drug	Qty
10/17/95	Adm Log	Demerol 50mg	2cc
08/18/95	Adm Log	Demerol 50mg	1cc
07/10/95	Adm Log	Demerol 50mg	2cc
07/07/95	Adm Log	Demerol 50mg	2cc
06/22/95	Adm Log	Demerol 50mg	2cc
04/14/95	Adm Log	Demerol 50mg	2cc

The drugs MS Contin, MS Contin 15mg, Vicodin, Vicodin ES, Hydrocodone 7.5mg, Hydrocodone 5mg, Percocet, Demerol 50mg, Tylox, Tylenol #3, Tranxene 7.5mg, Ambien 5mg, and Ambien 10mg are controlled substances and drugs having addiction-forming and addiction-sustaining liability.

Patient Kee is a 30 year old male who initially saw Licensee on February 24, 1995. On the initial visit, the

patient presented Licensee with a complaint of "Approx T-3-T4 pain. Wears hyperextension brace. MVA 1993. PT, MRI, Myelogram Athens, GA. Wants trigger point injection. Has "flare-ups" q 4-5 months." Other complaints noted on visits with Licensee are: "Continued severe pain"; "NP- Severe today T/S- Severe today"; "NP- Constant T/S- Constant"; Severe neck and mild thoracic pain c lateral chest spasm right arm pain returned 1 wk"; "F/U Neck pain and H/A's "same" Had RF done in July".

Despite surgeries and treatment with large quantities of controlled substances by Licensee, Patient Kee continued to have complaints of neck, thoracic spine, shoulder and right upper extremity pain. As a part of the patient's treatment, Licensee requested and obtained a number of specialty examinations, including MRI of the thoracic spine (negative), limited radionuclide bone scan (normal), and MRI of the cervical spine (negative), along with numerous referrals to consultants/specialists, who performed diagnostic and therapeutic procedures, i.e., Bruce S. Senter, M.D., Jackson, Mississippi, John Peloza, M.D., Plano, Texas, Charles April, M.D. New Orleans, Louisiana, Michael Hammer, M.D., Birmingham, Alabama, Perry Savage, M.D., Birmingham, Alabama, and Donald C. Guild, M.D., Jackson, Mississippi. A number of said consults transpired after notice of the investigation and disciplinary proceedings. Many of the specialty examinations failed to support the continuous complaints of pain by Patient Kee.

Based upon the following, Licensee knew or should have known that Patient Kee was suffering from possible drug opioid therapy:

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a. On 21 separate occasions, as hereinafter provided, Licensee issued to Patient Kee a prescription for a controlled substance at a time when said patient should not have been finished taking the same medication or similar medications from a prior prescription had the prescription directions been properly followed or the correct dosage taken. The repeated prescriptions allowed Patient Kee to receive dose escalations far in excess of therapeutic levels, i.e., between April 29, 1995, and July 7, 1995, Patient Kee was prescribed an average of 21.12 controlled substances per day.

b. On several occasions, Licensee would attempt to limit the patient's use of the controlled substance, i.e., November 27, 1995, prescription for 60 Vicodin ES with two (2) refills, patient directed to take 1 tablet every 4-6 hours prn for pain, "must last 12 days." Although such entries would appear to suggest that Licensee was attempting to control the patient's consumption of addictive drugs, rarely did Licensee enforce his own recommendations.

c. During his testimony, Patient Kee openly acknowledged that he discussed with Licensee his drug problem and concern as to the amount of drugs which he was taking. A review of the file reflects no evidence where Licensee documented the discussion or the patient's concern.

d. The repeated prescriptions and multiple dose escalations clearly suggests drug hoarding by the patient.

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Patient Kee is described by Licensee to be the "best candidate for suicide of any patient in my practice." Notwithstanding, Licensee did not make any entry in the file concerning the patient's suicidal ideation and did not refer the patient to Dr. Don Guild until well after the patient had already received substantial quantities of controlled substances and possibly after initiation of the Board's investigation.

Licensee issued to Patient Kee the following prescriptions at a time when said patient should not have been finished taking the same or similar medication from a prior prescription had the prescription directions been followed or the correct dosage taken:

Date	Script#	Drug	Qty	Directions
10/20/95	Pt File	Vicodin	50	
10/16/95	647341	Vicodin ES	30	1q4-6h Prn
10/09/95	433146	Vicodin ES	50 x1	1q4-6h Prn
10/03/95	432893	MS Contin 15mg	30	1po q8h Prn
10/03/95	432892	Vicodin ES	10	1po q8h Prn
10/02/95	Pt File	MS Contin	30	1po bid
09/25/95	432579	Vicodin ES	40	1ud
09/14/95	432218	Vicodin	40	1q4-6h
09/07/95	431968	MS Contin 15mg	30	1bid
09/07/95	432038	Vicodin ES	40	1q6h Prn
08/29/95	644448	MS Contin 15mg	30	1po bid
08/18/95	431348	Vicodin ES	60	1q4h prn

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08/14/95	431146	MS Contin 15mg	25	1po q12h Prn
08/01/95	430753	Vicodin ES	60x1	1q4-6h Prn
07/22/95	430438	MS Contin 15mg	24	1-a.m. & 2-p.m.
06/30/95	145760	Ambien 10mg	20 x2	1 Hs
06/26/95	429623	Vicodin	20	1q4h Prn Pa
06/19/95	429430	Vicodin	60 x1	1po q4h Prn
06/12/95	Pt File	Vicodin	60	
05/30/95	429194	Vicodin	60	1q4h Prn
05/15/95	428295	Vicodin	60	1q4h Prn Pa

Although medical file entries were found for the following prescriptions and injections, Licenses failed to enter into the file, a complete record of an examination or evaluation, including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof:

Date	Script#	Drug	Qty
11/27/95	434907	Vicodin ES	60x2
11/20/95	Pt File	Vicodin	60
10/20/95	Pt File	Vicodin	50
09/25/95	432579	Vicodin	40
08/18/95	Pt File	Vicodin ES	60x1
08/18/95	Pt File	Demerol 50mg	Im
06/30/95	145760	Ambien 10mg	20x2
06/30/95	145759	Vicodin	50
06/30/95	145758	Percocet	10

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06/26/95	429623	Vicodin	20
06/22/95	Pt File	Demerol 100mg	Im
06/22/95	510969	Percocet	15
06/19/95	429430	Vicodin	60x1
06/12/95	Pt File	Vicodin	60
05/15/95	428295	Vicodin	60

In each instance, Licensee entered into the patient file reference to only the prescription, drug and amount. In each instance, the file contains no reference to vital signs, observation of the patient's condition, the status of the patient's treatment plan, whether the patient's request for medication is early, and if so, why the patient has failed to comply with Licensee's instructions. Further, Licensee issued to Patient Kee the following prescriptions for controlled substances with *no* corresponding entry whatsoever, in patient's medical file:

Date	Script	Drug	Qty
01/02/96	436321	Hydrocodone 7.5mg	60x2
08/23/95	431471	MS Contin 15mg	20
08/06/95	430895	MS Contin 15mg	30
07/25/95	147274	Hydrocodone 5mg	60
07/22/95	430438	MS Contin 15mg	24
07/17/95	430234	MS Contin 15mg	14
05/30/95	429194	Vicodin	60
04/15/95	427226	Hydrocodone 5mg	50

5.

Between January 3, 1995, and January 29, 1996, Licensee did issue to Patient Pricilla Lovelace, sixteen (16)

prescriptions totalling approximately 2,700 dosage units (6.91 per day) including refills. Among these prescriptions were fifteen (15) prescriptions for 2,500 Tylenol #3 and one (1) prescription for 200 Acetaminophen with Codeine #3. Said prescriptions are summarized as follows:

Date	Script#	Drug	Qty
01/29/96	139155	Tylenol #3	100
01/11/96	138531	Tylenol #3	100
11/27/95	Pt File	Tylenol #3	100x2
11/13/95	136527	Tylenol #3	100
10/27/95	136057	Tylenol #3	100
09/29/95	Pt File	Tylenol #3	100x1
09/06/95	134376	Tylenol #3	100x1
08/01/95	4015021	Tylenol #3	100x1
07/18/95	132943	Tylenol #3	100
06/20/95	4014731	Tylenol #3	100x1
05/01/95	130781	Tylenol #3	100x1
04/05/95	4014325	Tylenol #3	100x1
03/22/95	129413	Tylenol #3	100x1
02/22/95	Pt File	Tylenol #3	100x1
02/06/95	127785	Tylenol #3	100
01/03/95	126682	Acetam/Codeine#3	100x1

The drug Tylenol #3 and Acetaminophen with Codeine #3 are controlled substances and drugs having addiction-forming or addiction-sustaining liability.

Analysis of the medical file indicates that Patient Lovelace is a 33 year old female, who initially saw Licensee on May 3, 1994. On the initial visit, the patient presented

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Licensee with a complaint of, "in the morning she wakes up with LBP et thoracic pain. This has been going on for about 2 months, has trouble turning over in bed." Other complaints noted in the file are; "c/o Thoracic-intermediate pain LBP-intermediate pain with pain extending into l hip et leg"; "LBP with R &L buttocks pain Unable to work"; "Thoracic area is worse LBP is also worse c/o pain being @ its worse @ R-L hips. Needs Rx on T #3, Naprosyn, Elavil"; "C/O Thoracic area is the same c/o LBP is worse. Needs Rx on T #3, Naprosyn"; "LBP- R=L side L leg pain occ. Thoracic R= L side Sleeps 3-4 hrs with meds."; C/O LBP is constant, with Rt side pain Thoracic is only occ pain."; T/S Continues LBP Continues."; and "LBP worse Having more back thigh pain x 3 days."

The patient's file reflects a medical and personal history. Licensee's primary diagnosis was fibromyalgia/disc pain problems, yet the file contains no specialty evaluation or consult report, providing the underlying cause for the numerous complaints of low back pain. Notwithstanding, Licensee continued to aggressively prescribe Tylenol #3, so that during the one (1) year profile period the patient received an average of 6-7 Tylenol #3 per day.

The file maintained by Licensee contains indicators or "red flags" suggesting possible drug abuse by Patient Lovelace. Based on the following entries, Licensee knew or should have known of a possible problem with controlled substances:

(a) Entry dated July 12, 1994 indicates that Patient Lovelace was issued a prescription for Tylenol

#3 after complaining of "LBP with R & L buttocks pain Unable to work Seen ER X1 *Not interested in surgery now.*"

(b) Entry dated December 1, 1994, indicates that Patient Lovelace was issued a prescription for Tylenol #3 after complaining, "Thoracic area is worse LBP is also worse C/O pain being @ its worse @ R-L hips. *Needs Rx on T#3, Naprosyn, Elavil Not wanting surgery yet!*"

(c) Entry dated February 22, 1995, noted "T/S-unchanged LBP c R=L hip numbness *needs Rx on T #3.*"

(d) Entry dated August 1, 1995, noted, "LBP-R+l side. L leg pain-occ. *Needs Rx for T3.* Sleeps 2 hrs."

Although entries for the following prescriptions were found in patient's file, Licensee failed to fully document and enter a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing the controlled substances or evidence of a good faith examination or medical indication thereof:

Date	Script#	Drug	Qty
01/29/96	139155	Tylenol #3	100
01/11/96	138531	Tylenol #3	100
11/13/95	136527	Tylenol #3	100

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10/27/95	136057	Tylenol #3	100
09/06/95	134376	Tylenol #3	100x1
07/18/95	132943	Tylenol #3	100
03/22/95	129413	Tylenol #3	100x1
02/06/95	127785	Tylenol #3	100
01/03/95	126682	Acetam/Codeine#3	100x1

In each instance, Licensee entered into the patient file reference to only the prescription, drug and amount. In each instance, the file contains no reference to vital signs, observation of the patient's condition, the status of the patient's treatment plan, whether the patient's request for medication is early, and if so, why the patient has failed to comply with Licensee's instructions.

6.

Between January 12, 1995, and January 12, 1996, Licensee did issue to Patient Jeffrey Gilmore, eighteen (18) prescriptions for controlled substances totalling approximately 2,250 dose units, including refills. Among these prescriptions were eleven (11) prescriptions for 1,400 Tylenol #3; five (5) prescriptions for 600 Apap/Codeine 30mg; one (1) prescription for 120 Darvocet N100; and one (1) prescription for 80 Vicodin ES. Said prescriptions are summarized as follows:

Date	Script#	Drug	Qty
01/12/96	Pt File	Tylenol #3	100x1
12/13/95	4439343	Tylenol #3	100x1
11/13/95	4438803	Tylenol #3	100x1

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10/27/95	4438520	Apap/Codeine 30mg	100
10/12/95	4438259	Tylenol #3	100
09/12/95	4437755	Apap/Codeine 30mg	100x1
08/24/95	4437493	Vicodin ES	40x1
08/21/95	4437430	Tylenol #3	100
08/04/95	4437179	Apap/Codeine 30mg	100
07/03/95	Pt File	Tylenol #3	50
06/19/95	Pt File	Tylenol #3	100x1
05/22/95	4436100	Apap/Codeine 30mg	100
04/19/95	4435599	Darvocet N100	60x1
03/16/95	4435026	Tylenol #3	100x1
03/03/95	Pt File	Tylenol #3	50
02/10/95	4434424	Tylenol #3	50x1
01/27/95	4434180	Apap/Codeine 30mg	50x1
01/12/95	4433915	Tylenol #3	50

Tylenol #3, Apap/Codeine 30mg, Vicodin ES, and Darvocet N100 are controlled substances and drugs having addiction-forming and addiction-sustaining liability.

Patient Gilmore is a 28 year old male, who initially saw Licensee on November 4, 1992. On this visit, the patient presented Licensee with a complaint of "Neck et L shoulder pain Began *6-1-92*. Mid et lower back pain. Rt leg goes numb, ends of *all fingers* on Rt hand goes numb. Has H/A now only this type since 6-1-92."

Other complaints noted in the file are; "C/O Cervical pain-"a little better" still having muscle spasm"; "C/O Cervical pain Ha's since 11/26/92 Caudal relief lasted 1 week then Ha's started LBP et mid back pain on et off pain"; "C/O LBP- Burning pain med not help- Shooting "sharp

pain" radiating op to cervical pain- Rt. side most painful-caudal help 2 days"; "C/O LBP et burning between shoulders going up into neck. Neck brace doesn't help"; "Terrible shoulder pain"; "C/O Cervical pain extending into et between shoulders. C H/A LBP et Rt hip et pt leg"; "C/O Thoracic pain today (maybe, because LBP) LBP-extending into Rt hip et leg"; "C/O lower back pain neck tension & migraine"; and "Pain troublesome in low back L hip."

Patient Gilmore was a workers' compensation disability case. Prior to and during treatment, Licensee referred the patient to a number of specialists, or had access to other physicians who examined Gilmore in relation to his workers' compensation claim. Several of the specialists who examined and/or treated Gilmore recommended intensive rehabilitation and conservative therapy. A number of said evaluations did not support the patient's claim for disability and/or did not support the patient's continuing complaints of chronic pain. On January 27, 1995, during the early stages of the prescription profile effort by the Board investigators, Linda H. Thompson, Administrative Judge for the Workers' Compensation Commission, found that Gilmore had not established a permanent occupational disability because of a work injury. Judge Thompson specifically found that the "caudal epidural steroid injections" as administered by Dr. McFadden were not only unnecessary, but were harmful. In her order, the Administrative Judge noted:

> 4. Gilmore has not proved that he has sustained a permanent occupational disability because of the work injury. His testimony in that regard is simply not believable. He did not like

Dr. Eckman because Dr. Eckman wanted to help him return to work. He did not follow up on the pest control position at Terminix. His past work history is riddled with stories of "misunderstandings" and "communication problems." He has been in trouble with the law on several occasions. The weight of the evidence indicates that when he consulted Dr. McFadden in November 1994 he was "doctor shopping" for a disability rating. Dr. McFadden is known as a physician who will render extended treatment based on a patient's subjective complaints of pain.

5. The treatment rendered by Dr. John W. McFadden was not required by the nature of the claimant's injury or the process of his recovery therefrom, and the employer and carrier are not liable for his charges. Had Gilmore followed the advice of the specialists who treated him, Dr. Eckman and Dr. Lynch, to pursue an aggressive physical conditioning program in August 1992, the employer and carrier would have been liable for the charges therefor.

After the above workers' compensation order, Licensee did recommend that patient undergo a number of pain management procedures by Michael Hammer, M.D., of Birmingham, Alabama.

For the following prescriptions, Licensee failed to fully document and enter a complete record of an examination

or evaluation including documentation of a diagnosis or medical justification for prescribing controlled drugs or evidence of a good faith examination or medical indication thereof:

Date	Script#	Drug	Qty
01/12/96	Pt File	Tylenol #3	100x1
12/13/95	4439343	Tylenol #3	100x1
10/27/95	4438520	Apap/Codeine 30mg	100
10/12/95	4438259	Tylenol #3	100
08/21/95	4437430	Tylenol #3	100
07/03/95	Pt File	Tylenol #3	50
04/19/95	4435599	Darvocet N100	60x1
01/27/95	4434180	Apap/Codeine 30mg	50x1
01/12/95	1133915	Tylenol #3	50

In each instance, Licensee entered into the patient file reference to only the prescription, drug and amount. In each instance, the file contains no reference to vital signs, observation of the patient's condition, the status of the patient's treatment plan, whether the patient's request for medication is early, and if so, why the patient has failed to comply with Licensee's instructions. Licensee issued to Patient Gilmore the following prescriptions for controlled substances with *no* corresponding entry whatsoever in medical file:

Date	Script#	Drug	Qty
09/12/95	4437755	Apap/Codeine 30mg	100x1
08/04/95	4437179	Apap/Codeine 30mg	100

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05/22/95	4436100	Apap/Codeine 30mg	100
03/16/95	4435026	Tylenol #3	100

7.

Between January 4, 1995, through January 16, 1996, Licensee did issue to Patient Jackie Tate, thirty-one (31) prescriptions for controlled substances totalling approximately 3,036 dosage units (8.05 average daily dose) including refills. Among these prescriptions were eighteen (18) prescriptions for 2,220 Vicodin; eleven (11) prescriptions for 780 Hydrocodone 5mg; one (1) prescription for 6 Percocet; and one (1) prescription for 30 Propoxyphene Nap/100. A summary of said prescriptions is as follows:

Date	Script#	Drug	Qty
01/16/96	159124	Vicodin	60x3
01/15/96	567275	Percocet	6
01/08/96	565039	Vicodin	60
11/08/95	154350	Propoxy Nap/100	30
11/01/95	547372	Vicodin	60x3
10/24/95	542542	Hydrocodone 5mg	60
10/11/95	539095	Hydrocodone 5mg	60
09/27/95	4406804	Vicodin	60x2
09/13/95	532701	Hydrocodone 5mg	60
09/04/95	528862	Hydrocodone 5mg	60
08/28/95	Pt File	Vicodin	60x2
08/21/95	4406644	Vicodin	60
08/16/95	148640	Vicodin	60
08/08/95	521936	Hydrocodone 5mg	60x1

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07/31/95	4406534	Vicodin	60x1
07/25/95	147276	Hydrocodone 5mg	60
07/18/95	516829	Hydrocodone 5mg	60
07/11/95	146391	Vicodin	60
06/27/95	512080	Vicodin	60
05/29/95	509954	Hydrocodone 5mg	60
05/27/95	4406277	Hydrocodone 5mg	60x1
05/05/95	499233	Vicodin	60x2
03/30/95	139677	Vicodin	60x2
03/15/95	485894	Vicodin	60x1
03/03/95	4405854	Vicodin	60x1
02/19/95	478528	Hydrocodone 5mg	60
02/03/95	Pt File	Vicodin	60x1
01/30/95	4405708	Vicodin	60x1
01/25/95	471208	Hydrocodone 5mg	60
01/11/95	466794	Vicodin	60
01/04/95	4405555	Vicodin	60

Patient Tate is a 26 year old male, who initially saw Licensee on March 2, 1989. On the initial visit, the patient presented Licensee with a complaint of "MVA 2-24-89 was in car and struck from the rear by another car. Pain started the next day 1. ER Union Co-exam, Rx c/o neck tightness c hyperextension R arm pain & numbness shoulder to *thumb* c/o LBP into R hip R leg "gets to feeling like giving out" pain wakes him at night."

Other complaints noted in the file are; "neck pain some improved pain came back c brace off LBP", R leg pain 3-4 x/wk Can't tell meds are helping"; "c/o lower R side et R leg is point of pain"; R leg pain post-to toes some numbness uses walking cane"; "Having numbness in arms

& aching. MVA in '89. Chronic LBP"; "C/O Burning up arm from hand Rt hand wants to stay numb LBP extends into Rt hip et leg some Rt side pain"; "C/O Pain in Rt hand, wrist et fore arm post op."; "Picking up fabric off pallets into shelves feet pain low back. 2/8/94- To ER per amb. X-rays, injection, Rx. Sleeping 3-4 c med. LBP-R-L hip pain extends both legs"; "C/O LBP-is constant c pain extends bilateral to legs Rt being worse, but tens does seem to help relieve pain. Can walk"; C/O LBP R=L side is unchanged. Employer ask him to see you because he has catch in R hip while working"; "C/O migraine", "Ha's x daily LBP-unchanged"; and "LBP to R side same Severe HA- R behind eye."

Despite surgeries and treatment with large quantities of controlled substances by Licensee, Patient Tate continued to have complaints of headaches, low back pain, and right leg pain. During treatment, Licensee referred Patient Tate to a number of different consultants and specialists, i.e., William A. Sims, M.D., Decatur, Alabama, Robert A. McGuire, M.D., Jackson, Mississippi, Luther Stumme, M.D., Tupelo, Mississippi, Michael Hammer, M.D., Birmingham, Alabama, and Robert A. Duke, M.D., Memphis, Tennessee. Many of the consultations followed an injury which Patient Tate suffered on February 8, 1994, while attempting to pick up a bag of concrete. During his testimony, Patient Tate acknowledged that he probably would not have attempted to pick up the bag of concrete had he not already been taking the pain medication prescribed by Licensee.

Patient Tate is described by Licensee as "one of the top four or five possible suicide candidates in my practice."

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Notwithstanding, Licensee did not at any time refer Patient Tate to a specialist for a psychiatric evaluation and consult and continued to prescribe to the patient an average of 8 Vicodin per day, and at times prescribed up to 13 Vicodin per day.

Based upon the following, Licensee knew or should have known of possible drug abuse:

1. As hereinafter noted, on 19 separate occasions, the patient obtained a prescription from Licensee at a time when said patient should not have been finished taking the same medication from a prior prescription had Licensee's directions been properly followed or the correct dosage taken.

2. The file contains a number of entries indicating that the patient continued to specifically request Vicodin, i.e., suggesting that Vicodin was the patient's drug of choice:

    a. Entry dated August 19, 1994 indicates that patient was issued a prescription for 60 Vicodin with one (1) refill after complaining of "LBP gets worse daily C/O numbness in R=L legs when sitting Needs Rx on Vistaril, Vicodin."

    b. Entry dated January 30, 1995, noted, "Ha's-still having daily but not so intense since taking Blocadren LBP-*unchanged* Needs Vicodin."

3. The file contains other entries indicating Licensee's awareness of the patient's attempts to obtain drugs early.

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a. Patient was issued a prescription for 60 Vicodin on October 24, 1995. A note in patient file written on an orange **Post It Pad** noted, "Doc, Patient Tate med is not due to 11-11-95. 24 Oct 60- Dr.

b. Entry dated October 5, 1995 noted, "Wife called for refill Vicodin-early and pt should have 2 refills available."

Although entries for the following prescriptions were found in patient's file, Licensee failed to fully document and enter a complete record of an examination or evaluation including documentation of a diagnosis or medical justification for prescribing the controlled substances or evidence of a good faith examination or medical indication thereof:

Date	Script#	Drug	Qty
01/15/96	567275	Percocet	6
01/08/96	565039	Vicodin	60
11/01/95	547372	Vicodin	60x3
10/24/95	542542	Hydrocodone 5mg	60
08/16/95	148640	Vicodin	60
06/27/95	512080	Hydrocodone 5mg	60
03/15/95	485894	Vicodin	60x1
03/03/95	4405854	Vicodin	60x1
02/03/95	Pt File	Vicodin	60x1
01/04/95	4405555	Vicodin	60

In each instance, Licensee entered into the patient file reference to only the prescription, drug and amount. In each

instance, the file contains no reference to vital signs, observation of the patient's condition, the status of the patient's treatment plan, whether the patient's request for medication is early, and if so, why the patient has failed to comply with Licensee's instructions. Licenses did issued to Patient Tate the following prescriptions for controlled substances with *no* corresponding entry whatsoever in the medical file:

Date	Script#	Drug	Qty
11/08/95	154350	Propoxy Nap/100	30
10/11/95	539095	Hydrocodone 5mg	60
09/13/95	532701	Hydrocodone 5mg	60
09/04/95	528862	Hydrocodone 5mg	60
08/21/95	4406644	Vicodin	60
08/08/95	521936	Hydrocodone 5mg	60x1
07/18/95	516829	Hydrocodone 5mg	60
01/25/95	471208	Hydrocodone 5mg	60

Licensee did issue to Patient Tate the following prescriptions for controlled substances at a time when said patient should not have been finished taking the same medication from a prior prescription had the prescription's directions been followed or the correct dosage taken:

Date	Script#	Drug	Qty	Directions
01/16/96	159124	Vicodin	60x3	1 q6h Prn Pa
11/08/95	154350	Darvocet N100	30	1 q6h Prn
11/01/95	547372	Vicodin	60x3	1 q6h Prn

10/24/95	542542	Hydrocodone 5mg	60	1 q6h Prn
10/11/95	539095	Hydrocodone 5mg	60	1 q6h Prn
09/13/95	532701	Hydrocodone 5mg	60	1 q6h Prn
09/04/95	528862	Hydrocodone 5mg	60	1 q6h Prn
08/28/95	Pt File	Vicodin	60x2	-
08/21/95	4406644	Vicodin	60	1 q4-6h Prn
08/16/95	148640	Vicodin	60	1 q4h Prn
08/08/95	521936	Hydrocodone 5mg	60x1	1 q6h
07/18/95	516829	Hydrocodone 5mg	60	1 q6h Prn
06/27/95	512080	Vicodin	60	1 q6h Prn
05/27/95	4406277	Hydrocodone 5mg	60x1	1 q4-6h Prn
03/30/95	139677	Vicodin	60x2	1 q4-6h Prn
03/15/95	485894	Vicodin	60x1	1-2Po q6h
02/03/95	Pt File	Vicodin	60x1	1q 15 days
02/02/95	4405708	Vicodin	60x1	1 q4-6h Prn
01/11/95	466794	Vicodin	60	1 q4h Prn

CONCLUSIONS OF LAW

1.

Based on the Findings of Fact as enumerated above, Licensee is guilty of Counts I, VI and IX as set forth in the Affidavit of Thomas E. Washington, dated June 12, 1996, as a result of Licensee's failure to maintain a complete

record of the examination, evaluation, and treatment, including documentation of the diagnosis and reason for prescribing controlled substances, all in violation of Section IV.E of the Rules and Regulations of the Board, "Pertaining to Prescribing, Administering and Dispensing of Medication," and in violation of Miss. Code Ann. Section 73-25-29(1)(m).

2.

Based on the Findings of Fact as enumerated above, Licensee is guilty of Counts II, IV, VII and X as set forth in the Affidavit of Thomas E. Washington, dated June 12, 1996, as a result of Licensee prescribing a controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith examination or medical indication thereof, in violation of Section IV.F of the Rules and Regulations of the Board, "Pertaining to Prescribing, Administering and Dispensing of Medication," and in violation of Miss. Code Ann. Section 73-25-29(1)(m).

3.

Based on the Findings of Fact as enumerated above, Licensee is guilty of Counts III, V, VIII and XI, as set forth in the Affidavit of Thomas E. Washington, dated June 12, 1996, as a result of Licensee prescribing drugs having addiction-forming or addiction-sustaining liability, otherwise than in the course of legitimate professional practice and being guilty of unprofessional conduct, which includes dishonorable or unethical conduct likely to deceive,

defraud or harm the public, in violation of Miss. Code Ann. Sections 73-25-29(1)(c), 73-25-29(1)(h)(iv), and Section 73-25-83(a).

4.

The above Findings of Fact clearly establish that Licensee not only issued numerous prescriptions for controlled substances or other drugs having addiction-forming or addiction-sustaining liability outside the course of legitimate professional practice, but did so at a time when he knew or should have known of possible drug abuse and/or dependency. In the case of Patients Dwight Kee and Jackie Tate, Licensee continued to issue new prescriptions for the same controlled substances at a time when the patient should not have been finished taking the same medication from a prior prescription had Licensee's directions been properly followed or the correct dosage taken. This occurred on 21 occasions for Patient Kee and 19 occasions for Patient Tate. Furthermore, testimony clearly established that Licensee was aware of potential drug problems in each case; Dwight Kee testifying before the Board that he actually discussed his drug problems. To no avail, Licensee continued to prescribe large quantities of controlled substances to said patient. Of equal or greater significance is the fact that both Patients Kee and Tate were described by Licensee as suffering from severe psychiatric disorders, i.e., suicidal ideation. In the case of Patient Kee, psychiatric consultation was not requested until January, 1996. In the case of Patient Tate, psychiatric consultation was never requested.

Appendix D

In the case of Patient Pricilla Lovelace, Licensee issued numerous prescriptions, i.e., patient receiving an average of 6 to 7 Tylenol #3 per day for approximately one (1) year, all based on a symptomatic diagnosis of fibromyalgia/ back pain, with no effort by Licensee to seek specialty evaluations/consultations and notwithstanding the fact that the patient declined surgery on a number of occasions. As to all four patients, Dwight Kee, Pricilla Lovelace, Jeffrey Gilmore and Jackie Tate, Licensee failed to maintain adequate patient records, i.e., 41% of the prescriptions issued to Kee, 56% of the prescriptions issued to Lovelace, 58% of the prescriptions issued to Tate, and 73% of the prescriptions issued to Gilmore, were either improperly referenced in the patient file or no reference at all was found. Furthermore, no reference is found in either the records for Patients Kee or Tate to the possible suicidal ideation, nor is any reference found relative to Licensee's discussion with Patient Kee of his drug problems. At no time did Licensee refer any of the patients to an expert for a chemical dependency consultation and/or evaluation.

During the hearing, it became apparent that Licensee's failure to maintain proper records and prescribe controlled substances in a proper and prudent manner, was but a small part of a more serious problem, that is, Licensee's inability to manage difficult patients. Every physician in Mississippi must handle difficult patients, and should not assume the role of the "all-caring" doctor. This is especially true with patients suffering from chronic non-malignant pain. The Board does not oppose physicians utilizing opioid therapy for long term treatment of intractable pain. Numerous exhibits were introduced by Licensee presenting the various

guidelines and "Intractable Pain Treatment Acts" adopted in other states including Texas, California, Washington and elsewhere. This Board finds that on June 23, 1992, Licensee received a letter from the Board's then Executive Officer, Frank J. Morgan, Jr., M.D., providing Licensee with recommendations as to Licensee's management of chronic pain patients. All of the recommendations by Dr. Morgan are found in the exhibits supported by Licensee. Notwithstanding, Licensee has failed to comply with the recommendation set forth in the June 23, 1992, letter from Dr. Morgan, and has also failed to meet many of the guidelines supported by his own exhibits.

Finally, it must be noted that the exhibits introduced by Licensee and the testimony of Licensee's expert, Daniel Brookhoff, M.D., establish that there is a legitimate difference of opinion among the experts as to the role of opioid therapy in the management of chronic non-malignant pain. The Board intends by this Order to set the record that the Mississippi State Board of Medical Licensure does not oppose the use of opioid therapy in the management of chronic non-malignant pain. Nonetheless, all doctors must strictly adhere to the rules and regulations of this Board and properly monitor the supply of drugs prescribed, administered and/or dispensed to patients. Had Licensee done so, after being duly warned on June 23, 1992, the disciplinary action taken herein could have been avoided.

ORDER

IT IS HEREBY ORDERED, that based upon the Findings of Fact and Conclusions of Law enumerated above,

Appendix D

Mississippi Medical License No. 05129, issued to John Wilbur McFadden, Jr., M.D., is suspended for an indefinite period of time, provided however, said suspension shall be automatically stayed subject to the following probationary terms and conditions:

1. Licensee shall not be permitted to order, manufacture, distribute, possess, dispense, administer or prescribe any controlled substances listed in Schedules II, IIN, III, IIIN and IV or any other drugs hereafter placed in said schedules, to any patient on an *out-patient basis* until authorized to do so by prior written order of this Board. Emergency room treatment is permitted under this section, provided, that prior to ordering the administration/dispensation of controlled substances, Licensee shall personally examine the patient and make a determination as to the need thereof. Out-patient prescribing of controlled substances from the emergency room is prohibited. Licensee shall possess full controlled substances privileges in all schedules for hospital in-patient use only. As used herein "hospital in-patient" means actual admission to a hospital or hospital managed out-patient facility. Licensee retains full privileges to administer, dispense, or prescribe controlled substances in Schedule V, with the exception of Buprenex (Buprenorphine) or its generic equivalent.

2. Licensee shall not be permitted to order, manufacture, distribute, possess, dispense, administer, or prescribe the medications Stadol

(Butorphanol Tartrate), Nubain (Nalbuphine), Soma (Carisoprodol), Butalbital, and Dalgan (Dezocine), or their generic equivalents to any patient on an out-patient basis until authorized to do so by written orders of this Board. Licensee shall possess full authority to utilize Stadol and Nubain, or their generic equivalents for hospital in-patient use only. As used herein "hospital in-patient" means actual admission to a hospital or hospital managed out-patient facility. Emergency room treatment is permitted under this section, provided, that prior to ordering the administration/dispensation of Stadol, Soma, Butalbital, Dalgan, and Nubain, Licensee shall personally examine the patient and make a determination as to the need thereof. Out-patient prescribing of Stadol, Soma, Butalbital, Dalgan and Nubain from the emergency room is prohibited.

3. Licensee shall comply with all Federal and State laws governing the practice of medicine and shall comply with the rules and regulations of the Board "Pertaining to Prescribing, Administration and Dispensing of Medication," including, but not limited to:

   a. Licensee shall maintain a complete record of his examination, evaluation and treatment of patients, including documentation of diagnosis and reason for prescribing, dispensing or administering any controlled substances; the name, dose, strength, quantity of the controlled substances and the date the controlled

substances was prescribed, dispensed or administrated.

b. Whenever issuing a prescription for a controlled substance, Licensee shall, in addition to that set forth in sub-paragraph a. above, enter into the patient record the following information:

i) Vital signs, whenever possible.

ii) Status of treatment plan and prognosis.

iii) If the patient is requesting additional medication too early, i.e., has consumed previously prescribed medications (including refills) contrary to Licensee's specific directions, the purpose and reason for the patient's additional request and/or unauthorized dose escalation.

iv) Licensee's observation of the patient.

c. Licensee shall not prescribe, administer, or dispense any controlled substance or other drug having addiction-forming or addiction-sustaining liability without a good faith prior examination and medical indication therefore.

4. Licensee's practice of medicine shall be subject to periodic surveillance by the Mississippi State Board of Medical Licensure. The Board's Executive Officer, any member of the Board or Medical

Consultant appointed by the Board, or investigative staff, may perform a patient chart review of a representative sample of those patients treated by Licensee.

5. During each year of probation, Licensee shall obtain 50 hours of Continuing Medical Education (CME) approved by the American Medical Association, at least fifteen (15) hours of which shall be in the area of addictionology. Following completion of each course, Licensee shall submit to the Board documentary proof of successful completion. During the first year of probation, Licensee shall successfully complete the course entitled, "Physician Education Program in Clinical, Legal and Ethical Issues in Prescribing Abusable Drugs," sponsored by the University of South Florida. All CME credits received by Licensee by virtue of said course shall be applied toward compliance with the 50 hour CME requirement during the first year of probation.

6. Licensee shall obey all federal, state and local laws, and all rules governing the practice of medicine, and shall comply with the rules and regulations of the Board "Pertaining to Prescribing, Administration and Dispensing of Medication." Licensee shall thoroughly familiarize himself with said rules and regulations and shall so indicate to the Board in writing.

7. In the event Licensee should leave Mississippi to reside or to practice outside the State, Licensee

shall, within ten (10) days prior to departing, notify the Board in writing the dates of departure and return. Periods of residency or practice outside Mississippi will not apply to the reduction of time periods specified in this Order.

8. Licensee shall have the right to petition the Mississippi State Board of Medical Licensure for release of any or all of the above enumerated conditions after expiration of five (5) years from the effective day hereof. Thereafter, any right to petition the Board for reconsideration shall be at reasonable intervals, but not less that twelve (12) months from date of last appearance.

IT IS FURTHER ORDERED, that pursuant to Section 73-25-27, a copy of this Determination and Order shall be sent by registered mail or personally served upon John Wilbur McFadden, Jr., M.D. or his attorney. Because Dr. McFadden was informed of this decision following Board deliberation, the order was directed to be given immediate effect.

GIVEN UNDER MY HAND and seal of office, this the 22nd day of November, 1996.

MISSISSIPPI STATE BOARD
OF MEDICAL LICENSURE

BY: s/ Richard L. Peden
RICHARD L. PEDEN, D.O.
PRESIDENT

APPENDIX E — LETTER OF THE SUPREME COURT AND COURT OF APPEALS, STATE OF MISSISSIPPI DENYING MOTION FOR REHEARING DATED APRIL 15, 1999

SUPREME COURT AND COURT OF APPEALS
STATE OF MISSISSIPPI
CHARLOTTE B. WILLIAMS, CLERK
THIRD FLOOR GARTIN BUILDING
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POST OFFICE BOX 249
JACKSON, MISSISSIPPI 39205-0249
TELEPHONE: (601) 359-3694
FACSIMILE: (601) 359-2407

Kathy Gillis
Chief Deputy

Bettye Malanchak
Deputy Clerk

April 15,1999

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 15th day of April, 1999.

Supreme Court Case #97-CC-01410-SCT
Trial Court Case #G962601

John Wilbur McFadden, Jr., M.D. v. Mississippi State Board of Medical Licensure

Motion for Rehearing, denied. Prather, C.J., Mills and Cobb, JJ., Not Participating.

Supreme Court, U.S.
FILED
AUG 12 1999
OFFICE OF THE CLERK

No. 99-112

In The

Supreme Court of the United States

JOHN WILBUR McFADDEN, JR., M.D.,

Petitioner,

v.

MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the disciplinary procedures utilized by the Mississippi State Board of Medical Licensure provided Petitioner with all due process rights under the United States and Mississippi Constitutions.

II. Whether the questions and comments posed by members of the Mississippi State Board of Medical Licensure, as triers of fact and law during an administrative hearing, violated Petitioner's rights to due process.

NOTE: Respondent disputes the manner in which Petitioner framed his "Questions Presented for Review."

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STATEMENT OF THE CASE

Petitioner seeks review of a February 4, 1999, decision of the Mississippi Supreme Court, affirming an unpublished opinion and order of the Chancery Court of Hinds County, Mississippi, affirming the decision rendered by the Mississippi State Board of Medical Licensure (hereinafter "Board") on November 22, 1996. The Board's decision placed certain restrictions on the Mississippi medical license of John Wilbur McFadden, Jr., M.D. (hereinafter "Petitioner"), based upon the Board's finding that Petitioner's conduct in his medical practice violated numerous sections of the Mississippi Medical Practice Act, and the rules and regulations promulgated by the Board pursuant to its rulemaking authority. Specifically, after a two (2) day hearing at which substantial evidence both for and against Petitioner was considered, the Board found Petitioner guilty of eleven (11) separate counts of administering, dispensing, and prescribing narcotic drugs (or other drugs having addiction-forming or addiction-sustaining liability) in a manner that was "otherwise than in the course of legitimate professional practice."

The Board further found that Petitioner's conduct of his medical practice was unprofessional, including dishonorable or unethical conduct likely to harm the public. Most importantly, the Board found that Petitioner was guilty of numerous violations of the Board's rules and regulations pertaining to the prescribing, administration, and dispensing of controlled substances. Of particular concern to the Board was Petitioner's failure to adequately monitor his patients' consumption of the significant quantities of controlled substances that he prescribed to them. The violations were significant in two

respects, (a) the rules and regulations of the Board provided clear guidance as to Petitioner's (or any other practitioner's) use of controlled substances and, (b) Petitioner had been warned on at least two (2) prior occasions without Board disciplinary action, relative to proper patient monitoring.

The suspension of Petitioner's license, however, was automatically stayed on the condition that he comply with certain probationary terms and conditions imposed by the Board. The stay granted by the Board permitted Petitioner to continue to practice medicine, subject to some limitations. Such limitations prevented Petitioner from prescribing certain controlled substances on an out-patient basis, but did not preclude him from administering controlled substances to patients who had been duly admitted to a hospital, or prescribing other drugs on an out-patient basis, such as anti-inflammatory agents, antibiotics, non-controlled analgesics, and numerous other prescription-only medications.

During the investigation and disciplinary proceedings Petitioner was provided every due process protection provided by both the U.S. and Mississippi Constitutions, summarized as follows:

1. Between 1992 and 1998, Petitioner was warned by the Board on at least two (2) occasions concerning improper maintenance of controlled substance records and monitoring patients who receive controlled drugs. Said warnings were non-disciplinary in nature.

2. Members of the Board did not participate in the investigation. Investigations are conducted by a separate investigative unit, the employees of

which do not communicate with the Board about pending investigations.

3. Petitioner received Notice of Hearing on or about June 12, 1996, setting forth the specific charges and supporting facts/circumstances.

4. A continuance was granted by the Board, thus allowing Petitioner five (5) months to prepare for his defense.

5. The full disciplinary hearing lasted two (2) days, November 21 and 22, 1996.

6. At said hearing Petitioner was represented by able counsel.

7. None of the Board members made any factual findings of guilt or participated in any reasonable cause determinations prior to the hearing.

8. At said hearing Petitioner called numerous witnesses on his behalf and introduced a substantial number of exhibits into evidence.

9. At said hearing Petitioner, through his counsel, cross-examined Board investigators and expert witnesses.

10. The Board considered only evidence in the record.

11. The Board did not deliberate or meet concerning this case except during the scheduled hearing dates.

12. The Board was represented by a Special Assistant Attorney General, who was not privy to the facts of the investigation prior to the hearing and who did not play any part in the prosecution. He acted solely as an objective advisor to the Board during hearing and deliberation.

13. The Complaint Counsel, retained for the specific purpose of prosecuting the matter, did not recommend sanctions or participate in the Board's executive session (deliberation).

14. At the hearing, Board Member Dr. Benton Hilbun, Tupelo (McFadden's hometown) recused himself.

15. Following the hearing, the Board rendered its "Determination and Order," setting forth its specific Findings of Fact, Conclusions of Law, and Order. Said Order is approximately 30 pages in length and is attached to Petitioner's Brief as Appendix D.

During the two days of testimony the Board considered "substantial credible evidence," a standard by which decisions of administrative boards are reviewed under Mississippi law. *See Mississippi State Board of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1983). In order to conserve the Board's time, resources and simplify the issues, the investigators (with advice from an independent medical expert) chose four (4) cases representative of the 36 files seized from Petitioner's office.

REASONS FOR DENYING THE WRIT

Disciplinary Procedures Utilized by Board Provided Adequate Due Process

Petitioner contends that he was denied due process of law because, in his opinion, the Board acted as investigator, prosecutor and judge. Petitioner further asserts that the questions and commentary by Board members were not to ascertain the true facts regarding Petitioner's administration of controlled substances for patients in

intractable pain, but to condemn him. Petitioner's denial of due process claim is based almost entirely upon his misrepresentations of various portions of the hearing transcript, in a disingenuous attempt to demonstrate that the Board was biased against him. Petitioner, however, also challenges the constitutionality of the institutional processes of the Board on the grounds that its combination of investigative and adjudicative activities offends the due process requirements of our state and federal constitutions.

The Board agrees with the cases cited by McFadden for the proposition that both the United States and Mississippi constitutions guarantee him due process before an administrative agency. It is also undisputed that administrative proceedings "must be conducted in a fair and impartial manner, free from any suspicion of prejudice, unfairness, fraud or oppression." *Mississippi State Bd. of Health v. Johnson*, 197 Miss. 417, 19 So. 2d 445, 447 (Miss. 1944). Furthermore, the Board agrees that an administrative board charged with resolving a dispute cannot take "the affirmative for an[d] in behalf of the protestant in deciding the issues in [a] case." *Illinois Cent. R.R. Co. v. Town of Goodman*, 252 Miss. 297, 173 So. 2d 116 (1965). In sum, "[d]ue process always stands as a constitutionally grounded procedural safety net in administrative hearings." *McGowan v. Miss. State Oil & Gas Bd.*, 604 So. 2d 312, 318 (Miss. 1992).

Unlike Petitioner, however, the Board agrees with the prior holdings of this Court which have held that in the case of administrative hearings, due process is not offended because the administrative board performs both the investigative and adjudicative functions. *Winthrow v.*

Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975), holding that "it is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. Notwithstanding this Court's decision in *Winthrow v. Larkin*, the Mississippi Board has taken additional steps (not mandated by law) to ensure a fair hearing. Of particular note, the Board's investigative staff independently prepares cases for presentation to the Board, without the involvement of Board members. The first time Board members are exposed to the substantive facts of a particular case is at the hearing on the matter. The actual preparation of cases is performed by the investigative staff, a medical consultant, and (typically) an expert witness, operating with legal assistance from the Board's Complaint Counsel.

The above facts clearly distinguish the procedures utilized by the Mississippi Board from that construed in *Winthrow v. Larkin, supra*, and *Wildberger v. AFGE*, 86 F.3d 1188 (D.C. Cir. 1996). In *Winthrow*, the members of the Wisconsin Medical Examining Board, conducted their own investigation, conducted reasonable cause determination hearings and later engaged in the contested hearing. In *Wildberger* the disciplinary procedure, including the investigation, determination of probable cause and hearing adjudication, was conducted by one individual. The Board also distinguishes the case cited by Petitioner, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), wherein the Fifth Circuit found a due process violation based upon a denial of Ms. Hornsby's liquor license, a decision made without a due process hearing, without an

opportunity to introduce evidence and to cross-examine witnesses, and without even an explanation revealing the basis for denying her application.

By comparison, the procedures utilized by the Mississippi Board have clearly gone beyond that required in *Winthrow v. Larkin* to ensure that Petitioner, as well as any other practitioner, are provided all elements of due process.

The Statements and Questions Posed by the Board Members did not Cast Doubt on the Board's Impartiality

It is a well established rule of law that there is a presumption that the officers conducting an administrative hearing and the members of the Board behave honestly and fairly in conducting the hearing and in the decision-making process. Absent some showing of personal or financial interest on the part of the hearing officer or evidence of misconduct on the officer's part, this presumption is not overcome.

The Mississippi Supreme Court, after a fair reading of the transcript of the hearing at issue, concluded that Petitioner received a fair and impartial hearing, was free from any suspicions of prejudice, unfairness, fraud or oppression. While "20/20 hindsight" may suggest that it would have been better for the Board members to keep all of their opinions regarding the evidence to themselves, it has been recognized by widely respected authorities that "a contentious atmosphere can be expected in many administrative hearings, and an attitude bordering on partisanship and even hostility, as

reflected in exchanges between the adjudicator and the charged party does not in and of itself prove bias." 2 Am. Jur. 2d, *Administrative Law* § 50 (1994). *By stating this, however, we do not intend to imply or even suggest that the Board was hostile or partial.* To the contrary, as evident from the record and arguments below, the Board members were not only objective, but extremely lenient in their approach to Petitioner's repetitious violations.

At the hearing on this matter all Board members were allowed to direct probative questions to the witnesses. Petitioner has taken a number of these questions/comments completely out of context or totally exaggerated their true meaning or intent. The questions/comments now at issue were presented with good purpose and intent to elicit information deemed necessary by the Board to make an objective decision. Being physicians themselves, Board members are often in the position of asking questions that a respondent physician may regard as "tough" or "unpleasant." It is here where Petitioner has totally misconstrued the purpose of the Board and has reached an ill-conceived conclusion of bias and prejudice. Simply stated, just because the question is a "tough" one that elicits information a respondent would rather suppress does not automatically render the person(s) asking the question "biased" or "prejudiced," as Petitioner would apparently have this Court believe.

Petitioner claims that one particular Board member stated that Petitioner was "dangerous," and improperly questioned Petitioner's medical expertise. This is simply an inaccurate portrayal of the record. What actually happened was that this particular Board member questioned Petitioner's expertise in diskoprophy because Petitioner

had previously testified that he had no formal training/residency in this specialty, yet he still claimed to be "one of the world experts" in this field. The actual question was whether a lack of formal training might be "dangerous." The Board respectfully submits that this line of inquiry does not show bias or impartiality, but rather was especially probative and relevant given Petitioner's exorbitant claims of expertise.

Further, Petitioner argues that on two occasions the same Board member stated that McFadden's testimony was "meaningless." Petitioner has once again misconstrued the statement by the same board member. In the first instance, Petitioner was giving an answer that rambles on for approximately three pages in the hearing transcript. The Board member was confused as to what sources Petitioner was basing his answers upon. After questioning the validity of the data relied upon by Petitioner, the Board member stated that "[t]his is meaningless." As is evidenced by other questions posed by the Board regarding Petitioner's lack of formal training in pain management, the Board apparently felt that Petitioner's private, non-published, undocumented, and unsubstantiated "research" did not render him a "world expert" on pain management. Given the benefit of "20/20 hindsight," it may have been better had this one particular board member saved his personal doubts as to the validity of Petitioner's claims until the Board moved into executive session. However, the Board respectfully submits that this does not show that the Board was prejudiced or biased against Petitioner.

Petitioner also contends that his witnesses were "attacked" by the Board. Not only is this incorrect, but it

is a total mis-characterization of the testimony contained in the transcript. As an example, one of the Board members asked a witness (one of Petitioner's patients) several questions, all of which were relevant to the issues then before the Board. One of these questions concerned whether said patient was compensating Petitioner for the services he rendered to her. In his brief to the Mississippi Supreme Court, Petitioner accused the Board of attacking this patient "with vengeance." Upon even a cursory review of the transcript, the Board member was not attempting to "trick" or "embarrass" the patient with this line of questioning. The Board respectfully submits that the Board member was merely clarifying a confusing area of the patient's testimony[1]

A substantial portion of the commentary, for which Petitioner voices objection, originated from a single member of a six member panel. Furthermore, the inappropriate and inexcusable characterization in Petitioner's Brief stating that the "panel members took advantage of every opportunity to present evidence," and give "their opinions" is factually incorrect. The six participating Board members were objective and fair. The Board also notes that one of the Board members, who was from the hometown of the Petitioner (Tupelo, Mississippi) recused himself. None of the Board members had a pecuniary interest in the outcome of the case or were targets of personal

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[1] The actual question by Dr. Bush was "[s]o you've been seeing him for a year, and you've paid him nothing? Okay. I'm not trying to embarrass you. It's just that you said that you pay him something."

abuse or criticism (see *Winthrow v. Larkin, supra*). Furthermore, none of the Board members were deemed to be in competition with Petitioner, or had prehearing contacts sufficient to pose a "high risk of bias." *See Wildberger v. AFGE, supra.* Finally, the Board notes that Petitioner's objection to the presence of the Board's Medical Consultant during executive session is without merit. At no time did Petitioner or his attorney voice objection concerning the fair and impartial manner in which the hearing was conducted, nor object to the presence of the Board's Medical Consultant during executive session. Petitioner did not raise this objection during his appeal to the Chancery Court of Hinds County, Mississippi. The issue was not raised until the matter was before the Mississippi Supreme Court, which found said argument to be without merit.

Consistent with the Board's position, the Mississippi Supreme Court found that Petitioner had misconstrued several comments made by the Board members and mistakenly reached the conclusion that the Board was biased against him. The Board will not attempt to address each statement and resulting misconstrual, but calls the Court's attention to the findings of the Mississippi Supreme Court, pages 30A through 33A of Appendix A.

Petitioner also has attempted to characterize this case as illustrative of the "raging debate in the medical community in this country between those who advocate long-term use of opioids for treatment of intractable pain and those who oppose such treatment except in terminally ill cancer patients." At no time during the hearing did members of the Board make it clear that they "came down on

the opposite of this debate." The Board's Order is clearly evidence of this fact, wherein it is stated:

> The Board intends by this Order to set the record that the Mississippi State Board of Medical Licensure does not oppose the use of opioid therapy in the management of chronic non-malignant pain. Nonetheless, all doctors must strictly adhere to the rules and regulations of this Board and properly monitor the supply of drugs prescribed, administered and/or dispensed to the patient. Had Licensee done so, after being warned on June 23, 1992, the disciplinary action taken herein could have been avoided.

It is interesting to note that in support of his argument, Petitioner cites the joint *amicus curiae* brief filed by the American Pain Society (APS) and American Academy of Pain Medicine (AAPM). At page 13 of the *amicus* brief, the APS and AAPM state, "Some pain specialists might maintain their charts differently than Appellant. . . . " Why would the APS and AAPM make such a statement? Simply stated, Petitioner was found guilty in 63 separate instances of failing to maintain a complete record of his diagnosis and reason for prescribing, dispensing or administering controlled substances. This included 43 separate instances of inadequate documentation and 20 separate instances of total lack of documentation.

The opinion of the Supreme Court of Mississippi is consistent with prior decisions of this Court and the federal courts of appeals. McFadden presents no basis in fact for his argument that the Board members based their decision on the evidence which they interjected into the proceedings without the right of cross-examination.

Legitimate and probing questions by board members who, prior to the hearing did not participate in the investigation, were legitimate and appropriate. Like judges, board members when sitting as both triers of fact and law, must ask appropriate and sometimes probing questions. Petitioner's inability to answer such questions in the face of clear and unequivocal violations of the rules and regulations of the Board does not justify a later condemnation of the Board as being "openly hostile."

Petitioner was granted every means of due process by the Mississippi State Board of Medical Licensure, beginning with initiation of the investigation, notice of charges, discovery, and subsequent disciplinary hearing.

CONCLUSION

For the reasons given above, the petition of John Wilbur McFadden, Jr., M.D., seeking a writ of certiorari, should be denied.

Respectfully submitted,

MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE

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